APPENDIX A

In the United States Court of Appeals for the Federal Circuit.

AMERICAN PELAGIC FISHING COMPANY, L.P., Plaintiff-Appellee,

v.

UNITED STATES, Defendant-Appellant.

No. 03-5101.

Aug. 16, 2004.

Before CLEVENGER, SCHALL, and BRYSON, Circuit Judges.

SCHALL, Circuit Judge.

The United States appeals the decision of the United States Court of Federal Claims that American Pelagic Fishing Co., L.P. ("American Pelagic") suffered a taking in violation of the Fifth Amendment to the U.S. Constitution, for which the court awarded damages in the amount of $37,275,952.67. *Am. Pelagic Fishing Co. v. United States*, 49 Fed.Cl. 36 (2001) (liability) ("*Am. Pelagic I*"); 55 Fed.Cl. 575 (2003) (damages) ("*Am. Pelagic II*"). We conclude, however, that American Pelagic did not suffer the taking of a property interest that is legally cognizable under the Fifth Amendment. We therefore reverse the decision with regard to liability, vacate the award of damages, and remand the case to the Court of Federal Claims with the instruction that it enter judgment in favor of the United States.

BACKGROUND

I.

This case involves commercial fishing for mackerel and herring in the Exclusive Economic Zone ("EEZ") of the United States in the Atlantic Ocean. The EEZ consists of the waters two hundred nautical miles from the coastal boundary of each state. See 16 U.S.C. § 1811 (2000); Proclamation No. 5030, 48 Fed.Reg. 10,605 (Mar. 14, 1983).

The pertinent facts are not in dispute. Throughout the 1990s, the National Marine Fisheries Service ("NMFS")[1] reported that mackerel and herring stocks in the Atlantic Ocean were at record highs and were substantially underfished. *Am. Pelagic*, 49 Fed. Cl. at 39. In 1993, a study commissioned by the U.S. Senate Finance Committee and prepared by the U.S. International Trade Commission concluded that only larger ships could improve the competitive position of the U.S. Atlantic mackerel industry with respect to European competitors. *Mackerel: Competitiveness of the U.S. Industry in Domestic and Foreign Markets*, Inv. No. 332-333, Pub. 2649 (Int'l Trade Comm'n June 1993). In 1994, following a recommendation by the Mid-Atlantic Fishery Management Council

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[1] The Magnuson-Stevens Fishery Conservation and Management Act, Pub.L. No. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C. §§ 1801-1883) ("Magnuson Act"), confers federal management authority over marine fishery resources upon the Secretary of Commerce ("Secretary") and the NMFS, a subunit of the National Oceanic and Atmospheric Administration, which is an agency within the Department of Commerce ("Commerce"). *See Am. Pelagic I*, 49 Fed. Cl. at 38-39.

("MAFMC"),[2] the NMFS rescinded its potential controls[3] over access to the Atlantic mackerel fishery, explaining that stocks were "extremely high" and harvesting low. *Atlantic Mackerel, Squid, and Butterfish Fisheries*, 59 Fed.Reg. 49,235 (Dep't Commerce Sept. 27, 1994) (rescinding the control date of August 13, 1992, set forth in *Atlantic Mackerel, Squid, and Butterfish Fisheries*, 57 Fed.Reg. 36,384 (Dep't Commerce Aug. 13, 1992)). In 1996, the MAFMC concluded that

> [i]n order to compete in the world bulk market, the U.S. will have to emulate its foreign competitors which harvest, process, and ship mackerel in large quantities so as to take advantage of economies of scale. Currently, the U.S. east coast industry does not have the large vessels necessary to participate in this market * * * .

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[2] The MAFMC is one of eight regional fishery councils charged with developing fishery management plans for fisheries within the EEZ in accordance with the standards set forth in the Magnuson Act. *See* 16 U.S.C. § 1851. The MAFMC has management responsibility for Atlantic mackerel, while the New England Fishery Management Council ("NEFMC") has management responsibility for Atlantic herring. Once a Fishery Management Plan ("FMP") is approved by the Secretary, it is promulgated by the NMFS. During the relevant time period in 1997, an official FMP was in place for the Atlantic mackerel fishery, but only a preliminary FMP was in place for the Atlantic herring fishery. *Am. Pelagic I*, 49 Fed. Cl. at 39.

[3] A "control date" provides notice to anyone subsequently entering a fishery that he is not assured of continued participation in the fishery should a limited entry scheme be implemented. *See, e.g., Atlantic Mackerel, Squid, and Butterfish Fisheries*, 57 Fed.Reg. 36,384 (Dep't Commerce Aug. 13, 1992).

Annual Quota Specifications for Atlantic Mackerel, Loligo, Illex, and Butterfish for 1997 12 (MAFMC July 1996).

For 1997, the NMFS established an allowable biological catch of 1.178 million metric tons of Atlantic mackerel, but commercial landings totaled only 15,406 metric tons. *Am. Pelagic I*, 49 Fed.Cl. at 39.[4] In its draft FMP for Atlantic herring in 1997, which was partially approved by the Secretary in 1999, the NEFMC proposed an allowable biological catch of 300,000 metric tons; yet, commercial landings totaled only 95,715 metric tons. *Id.* at 40.

II.

Lisa Torgersen is the President and sole shareholder of American Pelagic. *Am. Pelagic II*, 55 Fed.Cl. at 577. In November 1996, Atlantic Star Fishing Company, American Pelagic's predecessor, purchased a large, U.S.-flagged hull with the intent of transforming it into a commercial fishing vessel. *Id.* at 579-80. In January 1997, it contracted with a Norwegian shipyard to convert the hull into a freezer trawler—a large, commercial fishing vessel with the capacity to catch all of its own fish, freeze them on board, and offload them for shipping to their final destination. *Id.* at 579 n.6, 580. The result was the Atlantic Star, a vessel 369 feet long, displacing 6,900 gross tons, and having a total of 13,400 horsepower (about 7,000 horsepower for running the generators for the freezers and the remainder for propulsion). *Id.* at 580. Outfitted with the most sophisticated technology

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[4] The government's interrogatory responses indicate that commercial landings of Atlantic mackerel in 1997 totaled 15,406 metric tons, not 15,706 as the Court of Federal Claims stated in *Am. Pelagic I*, 49 Fed.Cl. at 39.

for locating, sorting, and freezing fish year-round, the *Atlantic Star* could safely hold 400 to 500 metric tons of fish. *Id.* at 580-81. American Pelagic's total investment in the vessel approached $40 million. *Am. Pelagic I*, 49 Fed. Cl. at 38.

While the vessel was being outfitted, American Pelagic set about applying for the necessary permits and gear authorizations. Pursuant to 50 C.F.R. § 648.4(a)(5) (1996), the *Atlantic Star* was required to carry on board a valid Atlantic mackerel permit to fish for, possess, or land Atlantic mackerel in or from the EEZ. Because of the potential for incidental bycatch, the *Atlantic Star* also was required to have a Northeast Multispecies (Nonregulated) fish permit. *Id.* § 648.4(a)(1). In April 1997, the Northeast Regional Office of the NMFS reissued both permits to American Pelagic:[5] Federal Fisheries Permit # 610018 for, *inter alia*, Atlantic mackerel, expiring December 31, 1997; and Federal Fisheries Permit # 610018 for Northeast Multispecies (Nonregulated), expiring April 30, 1998. In addition, pursuant to 50 C.F.R. § 648.80(d) (1996), on August 28, 1997, the Northeast Regional Office issued to American Pelagic a Gulf of Maine/Georges Bank Midwater Trawl Gear Authorization letter for, *inter alia*, Atlantic herring, expiring April 30, 1998.[6] *Am. Pelagic I*, 49 Fed. Cl. at 40.

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[5] Initially, the permits were issued to the Atlantic Star Fishing Company on February 5, 1997. *Am. Pelagic I*, 49 Fed.Cl. at 40.

[6] American Pelagic was required to carry this authorization letter because it planned to harvest fish with midwater trawl gear of mesh size less than that normally required by the regulations. 50 C.F.R. § 648.80(d).

III.

During 1997, as Ms. Torgersen prepared for commercial operation, opposition to the *Atlantic Star* began to develop. *Id.* Concerns about the size of the vessel and its potential effect on the Atlantic mackerel and herring fisheries were voiced at a joint meeting of the Herring Section of the Atlantic States Marine Fisheries Commission and the NEFMC Herring Committee in March 1997. These concerns subsequently were incorporated into legislation introduced in the U.S. House of Representatives to establish a moratorium on any fishing vessel, in the Atlantic mackerel and herring industries, equal to or greater than 165 feet in length, with an engine of more than 3,000 horsepower. *Id.* at 40-41 (citing H.R. 1855, 105th Cong. (1997)). In September 1997, a similar bill was introduced in the U.S. Senate. The Senate bill would have revoked Atlantic mackerel or herring permits that had been issued to vessels 165 feet or longer with an engine of more than 3,000 horsepower. *Id.* at 41 (citing S. 1192, 105th Cong. (1997)).

Despite the fact that neither bill was enacted, Congress passed a rider to an appropriations act that effectively cancelled American Pelagic's existing permits and authorization letter, and at the same time prevented any further permits from being issued to the *Atlantic Star*. *Id.* at 41-42 (citing text of Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub.L. No. 105-119, § 616, 111 Stat. 2440, 2518-19 (1997) ("1997 Appropriations Act")). The following year, Congress enacted the identical provision in another

appropriations act,[7] and in 1999, it made the size limitation and permit revocation permanent.[8] *Id.* at 42. The NMFS has since promulgated regulations reflecting this prohibition.[9] *Id.* As a result of the legislation, the *Atlantic Star* was unable to receive a permit to fish in any U.S. fishery within the EEZ; at the time, no other vessel was affected by the legislation. *Id.* at 42, 43.

After the *Atlantic Star's* permits were cancelled, American Pelagic took the vessel to the Baltic Sea to participate in a research project. During this time, the vessel operated as a "mother ship": it did not catch fish itself but merely processed the fish caught by other vessels. Because the venture was not profitable, the *Atlantic Star* spent only a few months in the Baltic. Subsequently, American Pelagic took the *Atlantic Star* to Mauritania, off the coast of west Africa, and purchased fishing rights for those waters while maintaining its status as a U.S.-flagged vessel. The vessel

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[7] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999, Pub.L. No. 105-277, tit. II, § 202, 112 Stat. 2681, 2681-618 (1998) ("1998 Appropriations Act").

[8] 1999 Emergency Supplemental Appropriations Act, Pub.L. No. 106-31, § 3025, 113 Stat. 57, 100-101 (1999) ("1999 Appropriations Act") (amending section 617 of the 1998 Appropriations Act).

[9] See *Fisheries of the Northeastern United States*, 64 Fed.Reg. 57,587 (Dep't Commerce Oct. 26, 1999) (revising 50 C.F.R. pt. 648 and imposing size and power limitations on vessels in the Atlantic mackerel fishery); *Magnuson-Stevens Fishery Conservation and Management Act Provisions*, 65 Fed.Reg. 77,450 (Dep't Commerce Dec. 11, 2000) (revising 50 C.F.R. pt. 648 and imposing size and power limitations on vessels in the Atlantic herring fishery).

and its equipment performed to expectations; however, the lack of fish and warm water temperatures prevented the *Atlantic Star* from being profitable. American Pelagic chose not to reflag the *Atlantic Star* and obtain authorization to fish in a foreign fishery. By April 1999, American Pelagic was operating at a loss. After unsuccessful attempts to secure additional financing, and after rejecting Chapter 11 bankruptcy, American Pelagic sold the *Atlantic Star* to two of its partners on July 6, 1999. *Am. Pelagic II*, 55 Fed. Cl. at 582-83.

IV.

American Pelagic brought suit in the Court of Federal Claims in March 1999, alleging that the 1997 and 1998 Appropriations Acts revoking its permits and barring it from receiving future permits effected a temporary taking of the *Atlantic Star*. *Am. Pelagic I*, 49 Fed.Cl. at 44. In its complaint, American Pelagic asserted that it had a property right in its fishery permits and authorizations that was taken by the legislation. Compl. ¶¶ 58, 64. American Pelagic further asserted that the United States had "taken, destroyed, and deprived [American Pelagic] of its compensable, investment backed expectations in the use and operation of the [*Atlantic Star*]" and had "taken all economically viable use" of the vessel. *Id.* ¶¶ 59-60, 65-66. Thus, American Pelagic alleged a taking of its property without just compensation in violation of the Fifth Amendment. *Id.* ¶¶ 61, 67. American Pelagic sought relief in the form of "the fair market value" of its property that had been taken, measured as "the expected net revenues or profit from operation of the [*Atlantic Star*] in the fisheries of the United States" during the fiscal years 1998 and 1999. *Id.* It estimated its just compensation to be in or around $10 million for each fiscal year, not including pre-or postjudgment interest, damages, costs, and attorneys' fees. *Id.* "Prayer for Relief" ¶¶ 1-3. In due course, the parties filed

cross-motions for summary judgment. On April 4, 2001, the Court of Federal Claims granted summary judgment in favor of American Pelagic on the issue of liability. *Am. Pelagic I*, 49 Fed. Cl. 36.

The court started from the premise that because licenses and permits are traditionally not protected by the Takings Clause, the *res* potentially taken by the legislation consisted of the *Atlantic Star* itself, which the government conceded to be property for Fifth Amendment purposes. *Id.* at 46. The court then explained, "To determine whether a property right exists independent of the regulatory scheme, it is necessary to decide 'whether an independent or preexisting right of use under common law applies.' " *Id.* at 47 (quoting *Maritrans Inc. v. United States*, 40 Fed. Cl. 790, 796 (1998)). In that context, the court determined that

> [t]he relevant stick in the bundle in this context is the right to use the *Atlantic Star* to fish, subject to regulation. * * * We are not confronted here with a property or a use which is inherently dangerous or a nuisance. There is nothing in the nature of a fishing vessel that suggests that any use is totally a matter of governmental grace. * * * Absent such a built-in limitation, personal property, like land, comes with an inherent right of use. We note that the right to use is one of the group of rights inhering in the citizen's relation to [a] physical thing.

Id. (citations and internal quotation marks omitted). The court thus determined that American Pelagic possessed a property interest "in using [the *Atlantic Star*] to fish." *Id.* at 48.

The court then embarked upon a regulatory takings analysis. In its analysis, the court decided that all three factors of the *Penn Central* test weighed in favor of finding that a regulatory taking had occurred: (i) American Pelagic's investment-backed expectation of participating in the

Atlantic mackerel fishery was reasonable; (ii) the degree of economic impact was severe enough to leave the *Atlantic Star* with no commercially viable uses; and (iii) the character of the government action, in purpose and effect, was both retroactive and targeted at American Pelagic. *Id.* at 48-51 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

The parties proceeded to a trial on damages in December 2002. *Am. Pelagic II*, 55 Fed.Cl. 575. The court awarded American Pelagic damages in the amount of the fair rental value of the *Atlantic Star*. In the absence of any market for leasing such a vessel for fishing off the east coast of the United States, the court derived a model for fixing the fair rental value based upon a "reasonably established net revenue stream" as presented by American Pelagic, with minor modifications. *Id.* at 584-90, 592-95. Ultimately, the Court of Federal Claims awarded American Pelagic damages in the amount of $37,275,952.67 for what it described as "a temporary regulatory taking of all value of its vessel for a twenty month period."[10] *Id.* at 595.

The government has timely appealed the Court of Federal Claims' decisions on both liability and damages. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

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[10] In *Am. Pelagic II*, the court also affirmed its previous analysis of the three Penn Central factors in light of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), which issued after *Am. Pelagic I* and which reaffirmed that the *Penn Central* analysis is the proper way to address whether a temporary regulatory taking has occurred. 55 Fed. Cl. at 590-91 (quoting *Tahoe-Sierra*, 535 U.S. at 335).

ANALYSIS

I.

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. Cl. R. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). We review a grant of summary judgment by the Court of Federal Claims *de novo* to determine whether it correctly applied this standard. See *Cienega Gardens v. United States*, 265 F.3d 1237, 1244 (Fed. Cir. 2001). We affirm if, when the facts are viewed in the light most favorable to the nonmoving party and doubts are resolved against the movant, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Helifix, Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339, 1345-46 (Fed. Cir. 2000). Whether a compensable taking has occurred is a question of law based on factual underpinnings. *Maritrans Inc. v. United States*, 342 F.3d 1344, 1350-51 (Fed. Cir. 2003) (citing *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001)). As noted above, in this case, the pertinent facts are not in dispute.

In reviewing a final decision of the Court of Federal Claims after a trial, we review legal conclusions *de novo*, and we review factual findings under the clearly erroneous standard. *Id.* (citing *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1379 (Fed. Cir. 2001)). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The government challenges both the grant of summary judgment on liability and the award of damages to American Pelagic. Because our ruling on the issue of liability disposes of the case, we do not reach the government's challenge to the award of damages.

II.

The law generally applicable to takings claims is well settled. The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V, cl. 4. The purpose of this prohibition is to prevent "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Real property, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); personal property, *see Andrus v. Allard*, 444 U.S. 51, 65 (1979); and intangible property, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984), each may constitute the *res* of a takings claim. The Supreme Court has recognized that the government may "take" private property either by physical invasion or by regulation. *Lucas*, 505 U.S. at 1014-15. This case involves an alleged regulatory taking. "A 'regulatory taking may occur when government action, although not encroaching upon or occupying private property, still affects and limits its use to such an extent that a taking occurs.'" *Cienega Gardens*, 265

F.3d at 1244 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)).[11]

We have developed a two-part test to determine whether a taking has in fact occurred. *See Maritrans*, 342 F.3d at 1351 (citing *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153-54 (Fed.Cir.1995)); *see also Conti v. United States*, 291 F.3d 1334, 1339 (Fed.Cir.2002), *cert. denied*, 537 U.S. 1112 (2003). First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment. *Maritrans*, 342 F.3d at 1351. "It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." *Wyatt*, 271 F.3d at 1096 (citing, *inter alia*, *Almota Farmers Elevator Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973); *Cavin v. United States*, 956 F.2d 1131, 1134 (Fed. Cir. 1992)). If the claimant fails to demonstrate the existence of a legally cognizable property interest, the courts task is at an end. *Maritrans*, 342 F.3d at 1352 (citing *M & J Coal*, 47 F.3d at 1154).

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[11] American Pelagic alleged a temporary, as opposed to a permanent, taking of its property interest. Temporary takings are not different in kind from permanent takings—a temporary taking simply occurs when what would otherwise be a permanent taking is temporally cut short. *Wyatt*, 271 F.3d at 1097. "The essential element of a temporary taking is a finite start and end to the taking." *Id.* In this case, the time period of the alleged taking ran from November 26, 1997, the date upon which American Pelagic's permits and authorization letter were revoked in the 1997 Appropriations Act, to July 6, 1999, the date on which the *Atlantic Star* was sold. *See Am. Pelagic II*, 55 Fed. Cl. at 576; Compl. ¶ 57.

Second, after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest. *Chancellor Manor v. United States*, 331 F.3d 891, 902 (Fed.Cir.2003) (citing *M & J Coal*, 47 F.3d at 1153-54). With regard to this second inquiry, we have stated that it is important to decide at the outset whether the alleged taking was "categorical" or not. *Id.* (citing *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1362 (Fed.Cir.2001) (on rehearing)). In *Rith Energy*, we explained the difference between a categorical and a noncategorical taking: A categorical taking has been defined as one in which "all economically viable use, i.e., all economic value, has been taken by the regulatory imposition." *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir.), *modifying* 208 F.3d 1374 (Fed. Cir. 2000). A categorical taking is distinct from a taking "that is the consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise be available to the property owner, but leaves the owner with substantial viable economic use." *Id.* 247 F.3d at 1362. When a taking is noncategorical, the court will undertake the fact-based inquiry enumerated in *Penn Central* to evaluate whether the governmental action constituted a compensable taking of the property interest. *Maritrans*, 342 F.3d at 1351. The three *Penn Central* factors are (i) the character of the governmental action, (ii) the economic impact of the action on the claimant, and (iii) the extent to which the action interfered with the claimant's reasonable investment-backed expectations. 438 U.S. at 124. On the other hand, when the taking is categorical, we have explained that "analyzing whether compensation is due does not require an inquiry into whether the plaintiff had reasonable investment-backed expectations that were defeated by the regulatory measure that gave rise to the takings claim." *Rith Energy*, 247 F.3d at 1362 (citing *Palm Beach Isles Assocs.*, 231 F.3d at 1357).

III.

Preliminarily, American Pelagic alleged that it had a property right in its "lawfully duly issued fishery permits and authorizations" that was "appurtenant to the use and operation of [American Pelagic's] fishing vessel, the [*Atlantic Star*]." Compl. ¶¶ 58, 64; Br. Pl.-Appellee at 27-29. According to American Pelagic, this property right was taken by the United States because the fishery permits and authorization letter had already been issued when the 1997 Appropriations Act was passed, and at the time, the NMFS lacked the discretion not to renew them. Br. Pl.-Appellee at 27-29. The Court of Federal Claims concluded, however, that no such property right existed: "Licenses or permits are traditionally treated as not protected by the Takings Clause because they are created by the government and can be cancelled by the government and normally are not transferable." *Am. Pelagic I*, 49 Fed. Cl. at 46.

On appeal, American Pelagic reasserts its contention that it had a legally cognizable property interest in its lawfully issued fishing permits and authorization letter. First, it argues that the permits and authorization letter were mandatory, rather than discretionary. *See Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir.1998) (finding, for purposes of a procedural due process claim, a constitutionally protectible property interest in a fishing quota permit from the NMFS because the NMFS had no discretion to deny a permit application if regulatory requirements were met). According to American Pelagic, the only grounds for denying their issuance or renewal were incomplete, late, or altered applications, or the failure to meet eligibility requirements, none of which applied in the case of the *Atlantic Star*. 50 C.F.R. § 648.4(e), (i). American Pelagic also argues that the permits could only have been revoked or

suspended for a specified "offense" or for failure to pay a penalty, neither of which occurred in this case. *Id.* § 648.4(m); 15 C.F.R. § 904.301(a) (1997).

The government responds that American Pelagic did not have a property interest in its fishery permits. In support of its position, it cites *Conti*, 291 F.3d at 1341, which concluded that a swordfishing permit did not confer a property interest for purposes of the Takings Clause. The government explains that American Pelagic's permits were not transferable or assignable, 50 C.F.R. § 648.4(k);[12] that they did not confer exclusive fishing privileges; and that they could be revoked, suspended, or modified by the government, *id.* § 648.4(h), (m).[13] In addition, the government distinguishes a constitutionally protected right to a permit under a due process analysis from a compensable property right under a Takings Clause analysis; according to the government, the two are not coterminous. The government points out that in *Foss*, upon which American Pelagic relies, the court actually engaged in a procedural due

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[12] Section 648.4(k) provides: "A permit issued under this part is not transferable or assignable. A permit will be valid only for the fishing vessel, owner and/or person for which it is issued." 50 C.F.R. § 648.4(k).

[13] Section 684.4(h) provides: "A permit will continue in effect unless it is revoked, suspended, or modified under 15 CFR part 904, or otherwise expires, or ownership changes, or the applicant has failed to report any change in the information on the permit application to the Regional Administrator as specified in paragraph (f) of this section." *Id.* § 648.4(h). Section 684.4(m) provides: "The Assistant Administrator may suspend, revoke, or modify, any permit issued or sought under this section. Procedures governing enforcement-related permit sanctions or denials are found at subpart D of 15 CFR part 904." *Id.* § 648.4(m).

process analysis, not a Fifth Amendment takings analysis. The government also points out that 15 C.F.R. § 904.301(a), upon which American Pelagic relies for the mandatory nature of its permits, specifically states that "Nothing in this subpart precludes sanction or denial of a permit for reasons not relating to enforcement."

We conclude that American Pelagic did not and could not possess a property interest in its fishery permits and authorization letter. In *Conti*, we explained that because he could not assign, sell, or transfer his swordfishing permit, because it did not confer exclusive fishing privileges, and because the government at all times retained the right to revoke, suspend, or modify it, Paul Conti did not possess a property interest in his permit. 291 F.3d at 1341-42. This "absence of crucial indicia of a property right, coupled with the government's irrefutable retention of the right to suspend, revoke, or modify" the swordfishing permit "compels the conclusion that the permit bestowed a revocable license, instead of a property right." *Id.* at 1342. The same reasoning extends to American Pelagic's permits and authorization letter. There is simply no contention that American Pelagic had the authority to assign, sell, or transfer its permits and authorization letter,[14] nor that it was granted exclusive

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[14] Although American Pelagic contends that its permits were potentially transferable to future owners of the *Atlantic Star*, it does not contend that those permits were transferable to a different vessel. Moreover, American Pelagic does not argue that it had the authority to effect a transfer of its permits to future owners of the *Atlantic Star*. It asserts only that future owners of the same vessel could apply for the same permits held by American Pelagic, and if they qualified, the permit numbers would stay the same and remain with the vessel.

privileges to fish for Atlantic mackerel and herring in the EEZ. American Pelagic distinguishes its permits from Mr. Conti's only by alleging that the government could not refuse to issue or reissue, revoke, modify, or suspend them in the absence of specified conditions. As the government notes, however, the regulation upon which American Pelagic relies specifically provides that "Nothing in this subpart precludes sanction or denial of a permit for reasons not relating to enforcement." 15 C.F.R. § 904.301(a). This language preserved the government's right to deny or sanction the permits and authorization letter issued to the *Atlantic Star*. The conditions we set forth in Conti are therefore met. We agree with the Court of Federal Claims that American Pelagic did not possess a property interest in its fishing permits and authorization letter.

IV.

American Pelagic's main contention in the Court of Federal Claims was that the 1997, 1998, and 1999 Appropriations Acts, as implemented in 50 C.F.R. pt. 648, effected a taking of the use of the *Atlantic Star* for fishing in the Atlantic mackerel and herring fisheries in the EEZ.[15] Compl. ¶¶ 57-58, 60-61. Specifically, American Pelagic

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[15] It is undisputed that American Pelagic had a property interest in the *Atlantic Star*. *See Am. Pelagic I*, 49 Fed. Cl. at 46. However, American Pelagic does not contend that the *Atlantic Star* itself was taken by the revocation of its permits and authorizations. In fact, as the trial court explained, "the owner was left with the ship; it was not physically taken. Instead, restrictions merely were placed on its use." *Id.* Thus, American Pelagics main contention, as stated in its complaint, was that the revocation of its permits and authorizations took from it the right to use the *Atlantic Star* to fish for Atlantic mackerel and herring in the EEZ.

argued that, in fiscal years 1998 and 1999, the revocation of its permits "prohibited [American Pelagic's] use of the [*Atlantic Star*] for its intended operation in the Atlantic mackerel and herring fisheries of the United States, and any other fishery of the United States * * * and has taken the expected net revenues or profits [American Pelagic] would have earned and received from use and operation of the [*Atlantic Star*] * * *." *Id.* ¶¶ 57, 63; see also *id.* ¶¶ 60, 66 ("United States has taken, destroyed, and deprived [*American Pelagic*] of its compensable investment backed expectations in the use and operation of the ATLANTIC STAR * * * and has taken all economically viable use of the [*Atlantic Star*] * * *."); Br. Pl.-Appellee at 20-27.

American Pelagic asserted that there was either a categorical or a noncategorical regulatory taking. According to American Pelagic, a temporary categorical taking occurred because the revocation of American Pelagic's permits and authorizations deprived the *Atlantic Star* of all economically beneficial use during the takings period. In the alternative, American Pelagic contended that analysis of each of the Penn Central factors established that a temporary noncategorical regulatory taking occurred.

The Court of Federal Claims concluded that American Pelagic did in fact possess a property interest in the use of the *Atlantic Star* to fish in the Atlantic mackerel and herring fisheries in the EEZ, and that this right was taken by the revocation of its permits and authorization letter. *Am. Pelagic I*, 49 Fed.Cl. at 44-52. The court first determined that the Takings Clause applies to both tangible and intangible personalty. *Id.* at 45-46. It then turned to the matter of identifying the property interest allegedly taken: "In this case, from the standpoint of traditional property concepts, the *res* potentially taken by the government was the ship itself." *Id.* at 46. However, the court recognized that the *Atlantic Star* itself was not taken nor destroyed; rather,

restrictions were placed upon its use. *Id.* Relying on *Lucas* for the proposition that compensation is owed when government "so completely destroys the beneficial uses of property that it is, in effect idled," the court distilled the existence of a property interest to a single question: "[A]re the uses prohibited within the bundle of rights otherwise inherent in the vessel?" *Id.*

The court answered: "To determine whether a property right exists independent of the regulatory scheme, it is necessary to decide 'whether an independent or preexisting right of use under common law applies.' " *Id.* at 47 (quoting *Maritrans*, 40 Fed. Cl. at 796, and citing *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 217 (Fed.Cir.1993)). While acknowledging that the use of the *Atlantic Star* to fish in the EEZ was entirely dependent upon a regulatory scheme, the court emphasized that the use (fishing) was not inherently dangerous, a nuisance, or "totally a matter of governmental grace." *Id.* Thus, the court concluded that "the right to use is one of the group of rights inhering in the citizen's relation to [a] physical thing. Inherent in the ownership of vessels is the right to use them." *Id.* (internal quotation marks and citations omitted). The court thus distinguished the nondangerous use of the *Atlantic Star* for fishing in the EEZ from the use of spent plutonium for nuclear fission, *Allied-Gen. Nuclear Servs. v. United States*, 839 F.2d 1572 (Fed.Cir.1988), and the importation of semiautomatic assault rifles into the United States for sale, *Mitchell Arms*, 7 F.3d 212. *Am. Pelagic I*, 49 Fed. Cl. at 47. Finally, the court distinguished *Conti* on the ground that the restriction there was limited to a particular use of the claimant's boat (fishing for swordfish using drift gillnets) and did not, as the court found in this case, restrict all economically beneficial uses. Nor was there any allegation, as there is here, that Mr. Conti was being targeted by the legislation that banned the use of drift gillnets for swordfishing. *Id.* at 48. Accordingly, the court

concluded that because "[f]ishing as a livelihood is not a creation of the government * * * [American Pelagic] possessed a property interest in using its vessel to fish, albeit subject to the regulatory regime." *Id.*

Having found a cognizable property interest, the court went on to determine that each of the *Penn Central* factors was satisfied. *Id.* at 48-51. The court concluded that from the time the 1997 Appropriations Act was passed until the time that American Pelagic sold the *Atlantic Star*, the government "took [American Pelagic's] property interest in the use of its vessel to fish for Atlantic mackerel in the EEZ * * *." *Id.* at 51.

V.

A.

On appeal, the government challenges the grant of summary judgment on liability in favor of American Pelagic. The government starts from the premise that in order for a taking claim to succeed, what must be taken is one of the sticks in the bundle of rights that defines the owner's relationship to the *res*. From there, it argues that the Court of Federal Claims erred in holding that American Pelagic possessed a property interest in the use of the *Atlantic Star* to fish for Atlantic mackerel and herring in the EEZ, even subject to government regulation. The government urges that no property interest exists in an individual's investment in uses of personalty that are dependent upon discretionary permit issuances by the government. Br. Def.-Appellant at 22.

American Pelagic recognizes that one of the sticks in the bundle of property rights that the owner of property acquires with his title must be proscribed in order for a taking to occur. Br. Pl.-Appellee at 21-27; Supp. Br. Pl.- Appellee at 2. However, because the use of the *Atlantic Star* to fish was lawful not only under traditional property and nuisance

principles, *Lucas*, 505 U.S. at 1030, but also under the regulatory regime by which its permits were issued, American Pelagic argues that use of the vessel to fish for Atlantic mackerel and herring constituted a legally cognizable property interest. In contrast to *Mitchell Arms*, in which we explained that the ability to sell a firearm does not inhere in ownership of the firearm itself upon the owner's acquisition, American Pelagic asserts that the right to fish for Atlantic mackerel and herring in the EEZ did inhere in its ownership of the *Atlantic Star*.

Thus, the question we must answer is this: Was the right to fish for Atlantic mackerel and herring in the EEZ a legally cognizable property interest such that it was a stick in the bundle of property rights that American Pelagic acquired as the owner of the *Atlantic Star*? For the reasons that follow, we conclude that it was not. Consequently, American Pelagic's takings claim fails.

B.

We determine whether an asserted right is one of the rights in the bundle of sticks of property rights that inheres in a *res* by looking to "existing rules or understandings" and "background principles" derived from an independent source such as state, federal, or common law. *Lucas*, 505 U.S. at 1030 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972)).[16] These rights define the dimensions of the

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[16] The Court explained:

> [O]ur "takings" jurisprudence * * * has traditionally been guided by the understandings of our citizens regarding the content of, and the States power over, the "bundle of rights" that they acquire when they obtain title

(cont'd)

requisite property interest for purposes of establishing a takings claim. Significantly, the Supreme Court has distinguished personal property from real property:

> And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979).

Lucas, 505 U.S. at 1027. Thus, it is conceivable that the owner of personal property, as opposed to land, may have a lower expectation that he has a property interest in using his personal property for commercial dealings. Moreover, there is a distinction between simply not being disturbed in the particular use of one's property and having the *right* to that use of the property. Clearly, in order for there to be a cognizable property interest sufficient to support a takings claim, the latter must be true. Thus, simply because many commercial fishermen were not affected by the 1997, 1998, and 1999 Appropriations Acts and continued to fish for Atlantic mackerel and herring in the EEZ, it does not follow

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> to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "as long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pa. Coal Co. v. Mahon*, 260 U.S. [393,] 413 [(1922)].

Lucas, 505 U.S. at 1027.

that those fishermen had a *property interest* in the use of their vessels to fish in the EEZ. They simply were enjoying a use of their property that the government chose not to disturb. In other words, use itself does not equate to a cognizable property interest for purposes of a takings analysis.

C.

Up until the 1960s, most nations with coastlines, including the United States, had declared jurisdiction over territorial seas of three miles and conservation zones of twelve miles. See, *e.g.*, Bartlett Act, Pub. L. No. 88-308, 78 Stat. 194 (1964) (previously codified at 16 U.S.C. §§ 1081-86) (three-mile territorial sea jurisdiction); Pub. L. No. 89-658, 80 Stat. 908 (1966) (previously codified at 16 U.S.C. §§ 1091-94) (three-to twelve-mile conservation zone jurisdiction) (both repealed by the Magnuson Act, title IV, § 402(a), (b), 90 Stat. at 360). Similarly, prior to the enactment of the Magnuson Act, a state could regulate its state-registered vessels and its citizens while fishing in what is now the EEZ pursuant to a line of Supreme Court cases culminating in *Skiriotes v. Florida*, 313 U.S. 69 (1941). Countries generally attempted to achieve conservation of fish by entering into international fishing agreements (to approximately twenty of which the United States was a party). *See* S. Rep. No. 94-416, n.3, app. 1. In 1976, however, in response to the third session of the United Nations Convention on the Law of the Sea ("UNCLOS"), which provided for coastal nation management of resources within a two-hundred-mile zone, Congress enacted the Magnuson Act:

> Fishery conservation zone
>
> There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the

> seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

16 U.S.C. § 1811 (1976).

Subsequently, in a presidential proclamation, President Reagan established the EEZ and assumed sovereign rights for the United States over this two-hundred-mile zone. Quoting from UNCLOS, Dec. 10, 1982, art. 56, p 1, 21 I.L.M. 1245, 1280,[17] he announced:

> Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds * * *.

Proclamation No. 5030, 48 Fed.Reg. 10,605. It is clear from this language that, at least as of 1983, the United States had asserted sovereignty with respect to the exploration, exploitation, conservation, and management of the natural resources of the EEZ. This assertion of sovereignty was subsequently codified in the 1986 amendments to the Magnuson Act:

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[17] To date, the United States has not ratified UNCLOS.

> United States sovereign rights to fish and fishery management authority
>
> (a) In the exclusive economic zone. Except as provided in section 102 [16 USCS 1812], the United States claims, and will exercise in the manner provided for in this Act, sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone.
>
> (b) Beyond the exclusive economic zone. The United States claims, and will exercise in the manner provided for in this Act, exclusive fishery management authority over the following:
>
> (1) All anadromous species throughout the migratory range of each such species beyond the exclusive economic zone; except that that management authority does not extend to any such species during the time they are found within any waters of a foreign nation.
>
> (2) All Continental Shelf fishery resources beyond the exclusive economic zone.

Act of Nov. 14, 1986, Pub. L. No. 99-659, tit. I, § 101(b), 100 Stat. 3706, 3706-07 (codified as amended at 16 U.S.C. § 1811 (2000)). Thus, Congress explicitly assumed "sovereign rights and exclusive fishery management authority over all fish" in the EEZ. This assumption of sovereignty indisputably encompasses all rights to fish in the EEZ.

The various provisions of the Magnuson Act are consistent with this exercise of U.S. sovereignty over the EEZ and the fish and resources within it. Enacted to "take immediate action to conserve and manage the fishery resources found off the coast of the United States," 16 U.S.C. § 1801(b)(1), the Magnuson Act established national

standards by which fishery "conservation and management" plans would be developed, *id.* § 1851(a). Congress further established under the auspices of the Secretary Regional Fishery Management Councils, including the NEFMC and the MAFMC, with direct authority over the fisheries within their respective geographic regions. *Id.* § 1852. As noted above, each council is charged with the obligation, among others, of preparing and submitting FMPs for the fisheries within its authority. *Id.* § 1852(h). Congress required the FMPs to contain

> conservation and management measures * * * necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery * * *.

Id. § 1853(a)(1)(A). Significantly, the Magnuson Act bars foreign fishing in the EEZ entirely, except as the United States permits, *id.* § 1821, and authorizes the regional councils to require federal permits for U.S. fishermen to fish in any fishery within the EEZ, *id.* § 1853(b)(1). Thus, in addition to asserting U.S. sovereignty over the EEZ and the fish and resources therein, Congress also erected an elaborate framework by which the fisheries in the EEZ would be managed under the oversight of the Secretary.

Pursuant to the Magnuson Act, the "conservation and management of the EEZ" belongs to the sovereign, and this necessarily includes the right to fish in the zone. Moreover, there is no language in the statute to the effect that any fishing privileges that are granted pursuant to the Magnuson Act vest in their owners a property right protected by the Fifth Amendment. *See Foss*, 161 F.3d at 588 ("[T]he language of the Magnuson Act does not confer any claim of entitlement or property rights."); *see also Parravano v. Babbitt*, 861 F.Supp. 914, 928 (N.D. Cal. 1994) ("Thus, the

Magnuson Act confers on the Secretary of Commerce authority to manage the fishery resources in the EEZ for conservation. It does not confer on commercial fishermen any right or title in the fishery resources under the Department of Commerce's authority."), *aff'd*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996).

Because it was already in place by the time American Pelagic purchased the *Atlantic Star*, the Magnuson Act was an "existing rule" or "background principle[ ]" of federal law that inhered in American Pelagic's title to the vessel. *Lucas*, 505 U.S. at 1029-30. In the words of the Supreme Court, as far as ownership of the *Atlantic Star* was concerned, the sovereign rights of the United States in the EEZ "inhere[d] in the title itself, in the restrictions that background principles of the [federal government's] law * * * already place[d] upon * * * ownership." *Id.* at 1029 (discussing restrictions on real property). It was against this framework of existing federal restrictions on fishing in the EEZ that American Pelagic invested in the *Atlantic Star*. As of 1996, when the *Atlantic Star* was purchased, the Magnuson Act and the attendant regulatory scheme precluded any permitted fisherman from possessing a property right in his vessel to fish in the EEZ. The revocation of American Pelagic's permits, therefore, did not "go[ ] beyond what the relevant background principles would dictate." *Id.* at 1030.

The Magnuson Act is consistent with the historical role played by the sovereign, state or federal, with respect to its waters. As early as 1876, the Supreme Court concluded that

> [t]he principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running.

McCready v. Virginia, 94 U.S. 391, 394 (1876) (citations omitted); *see also, e.g., State v. Leavitt*, 105 Me. 76, 72 A. 875, 876 (1909) ("It is, therefore, settled law that each State, unless it has parted with title * * * owns the bed of all tidal waters within its jurisdiction, and as well, the tide waters themselves and the fish in or under them, so far as they are capable of ownership. * * * It is in fact a property right * * *.").

We are not persuaded by American Pelagic's contention that there exists a historical common law right to use vessels to fish in the EEZ that was not abrogated by the Magnuson Act. American Pelagic points to language in the Magnuson Act that Congress was authorizing "no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources * * *." 16 U.S.C. § 1801(c)(2). Plainly, rendering the ability to fish in the EEZ a matter of governmental permission, rather than a property right, is "necessary for the conservation and management of fishery resources * * *." *Id.* The language itself thus explicitly carves out from the "legitimate uses" those involved in the conservation and management of fishery resources. Additionally, the phrase "conservation and management" is broadly defined in the statute to include, *inter alia*, "all of the rules, regulations, conditions, methods, and other measures * * * which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment * * *." *Id.* § 1802(5) (2000). The right to use the *Atlantic Star* to fish for mackerel and herring unquestionably implicates the conservation and management of fishery resources. Accordingly, we conclude that the Magnuson Act directly assumes for the federal government sovereignty over the right to fish for Atlantic mackerel and herring in the EEZ. As American Pelagic itself notes, the Magnuson Act expressly

asserts the United States' "sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish" within the EEZ. *Id.* § 1801(b)(1). The statute does not explicitly, or implicitly, preserve any potentially pre-existing common law right to fish in the EEZ.[18]

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[18] American Pelagic points to the text of 43 U.S.C. § 1332(1), (2) (2000), which provides the United States with "jurisdiction, control, and power of disposition" over the subsoil and seabed of the outer Continental Shelf that underlies the waters of the EEZ. The statute states that "the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected * * *." Outer Continental Shelf Lands Act, Pub. L. No. 212, ch. 345, §§ 2(a), 3(b), 67 Stat. 462, 462 (1953) (codified as amended at 43 U.S.C. § 1332) ("OCSLA"). Citing *Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979), American Pelagic contends that the Magnuson Act did not abrogate this congressional recognition of the right to fish in the EEZ. However, because it was enacted in 1953, more than twenty years prior to enactment of the Magnuson Act, OCSLA's intention not to affect the then-existing rights to navigation and fishing does not bear on the subsequent effect of the Magnuson Act. Moreover, the court in *Massachusetts v. Andrus* was not faced with the question of whether a property right to fish in the EEZ existed, but with the question of whether the Secretary of the Interior had authority to permit the sale of oil drilling leaseholds off the coast of New England. In *dicta*, the court did state that it was "unable to see that [the Magnuson Act] altered the meaning and purpose of [42 U.S.C. section 1332(2)], which had been directed at the legal right to fish rather than at prohibiting physical impediments." 594 F.2d at 889. Yet, the court also stated that the Magnuson Act is "thus no less an assertion of a federal interest in conserving the fishery resources in the waters of the Outer Continental Shelf than was the earlier Outer Continental Shelf Lands Act an assertion of a federal interest in developing the oil and gas wealth of the subsoil and seabed in the same area." *Id.* at 891. We do not think that OCSLA and *Massachusetts v. Andrus* help American Pelagic.

Neither are we persuaded by American Pelagic's reliance on President Reagan's Proclamation No. 5030, which states that the establishment of the EEZ "does not change existing United States policies concerning the continental shelf, marine mammals and fisheries * * *." 48 Fed. Reg. at 10,605. The short answer is that "existing United States policies" included those "policies" enshrined in the Magnuson Act itself, which predated Proclamation No. 5030.[19] In sum, no right to fish in the EEZ inhered in American Pelagic's title when it acquired the *Atlantic Star*. Because the right to use the vessel to fish in the EEZ was not inherent in its ownership of the *Atlantic Star*, American Pelagic did not suffer the loss of a property interest for purposes of the Takings Clause when its Atlantic mackerel and herring permits were revoked.

Our conclusion is consistent with *Mitchell Arms* and *Conti*. In the first case, Mitchell Arms, Inc. ("Mitchell Arms") filed suit in the United States Claims Court alleging that the decision of the Bureau of Alcohol, Tobacco, and Firearms to revoke permits allowing the importation and sale of semi-automatic assault rifles constituted a taking of its

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[19] American Pelagic also points to the statement in the fact sheet accompanying Proclamation No. 5030 that "The President has not changed the breadth of the United States territorial sea." American Pelagic's reliance on this statement is misplaced. The EEZ, as stated in Proclamation No. 5030, is an area "beyond the territory and territorial sea of the United States," 48 Fed. Reg. at 10,606, that now extends to twelve nautical miles from the baseline of the United States. Proclamation No. 5298, 54 Fed. Reg. 777 (Dec. 27, 1988). Even assuming it is to be accorded any measure of authoritative force, the statement in the fact sheet simply does not pertain to the assumption of sovereignty over fisheries in the EEZ pursuant to the Magnuson Act.

right to use the permits for those purposes. *Mitchell Arms*, 7 F.3d at 215. The Claims Court dismissed Mitchell Arms' complaint under its Rule 12(b)(4) for failure to state a claim upon which relief could be granted. *Id.* The court concluded that neither the permits themselves nor Mitchell Arms' expectations arising from the combination of the permits and its contract to purchase the firearms from a foreign party gave rise to a property interest for purposes of the Fifth Amendment's Takings Clause. *Id.* Mitchell Arms appealed the court's decision and we affirmed. In our decision, we characterized Mitchell Arms' claim as follows: "that a property interest was created when it agreed to purchase the firearms with an expectation of importing them under the issued permits." *Id.* We agreed with the Court of Federal Claims, however, that no taking had occurred, for we determined that Mitchell Arms had failed to assert a property interest protected by the Fifth Amendment. *Id.* at 215-17. We stated that the right to sell assault weapons in domestic commerce was not "a right inherent in plaintiff's ownership of [the] weapons." *Id.* (quoting *Mitchell Arms, Inc. v. United States*, 26 Cl.Ct. 1, 6 (1992)).

The plaintiff in *Conti* was Paul Conti, a swordfisherman. Mr. Conti was the owner of the *F/V Providenza*, a vessel that he used to fish for swordfish in the Atlantic Swordfish fishery using drift gillnets. Mr. Conti filed suit in the Court of Federal Claims alleging that the government's 1999 ban on harvesting swordfish using drift gillnets constituted a regulatory taking of his swordfishing permit, the *Providenza*, and his gillnet gear without just compensation, in violation of the Fifth Amendment. 291 F.3d at 1337. Mr. Conti contended that, while he still was in possession of his permit, the *Providenza*, and his gear, there had been taken from him the ability to use those things in a particular way: to fish for swordfish in the Atlantic Swordfish fishery using drift gillnets. *Id.* at 1340. The Court of Federal Claims dismissed

Mr. Conti's complaint for failure to state a claim upon which relief could be granted. The court determined, *inter alia*, that continued use of Mr. Conti's property for harvesting swordfish with drift gillnets did not constitute a compensable property interest. *See Conti v. United States*, 48 Fed. Cl. 532, 539 (2001) ("The ability to use gillnets to harvest swordfish is not a right inherent in holding a permit nor in the ownership of the gear or the vessel.").

Mr. Conti appealed the dismissal of his complaint, and we affirmed. We did so on two grounds. Relying on *Andrus v. Allard*,[20] we concluded that Mr. Conti's "continuing ability

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[20] The claimants in *Andrus* contended that federal regulations prohibiting the sale of parts of birds that were legally killed before the birds were protected by federal statute effected a taking of their bird artifacts. *Andrus*, 444 U.S. at 64. The Supreme Court disagreed:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

Id. at 65-66. The Court went on to explain that the fact that the regulations prevented the most valuable use of the claimants' property was not dispositive, and that a reduction in the value of property does not necessarily amount to a taking. *Id.* at 66. The Court stated that the loss of future profits, in the absence of any physical property restriction, "provides a slender reed upon which to rest a takings claim." *Id.*

to sell the vessel and the gear, fish in a different fishery, or put both the nets and vessel to other uses" precluded us from ruling that a regulatory taking had occurred. *Conti*, 291 F.3d at 1343. We also stated that Mr. Conti's takings claim failed "for an additional reason." *Id.* at 1345 n.8. After noting that Mr. Conti's ability to use his vessel and gear to catch swordfish using drift gillnets was dependent upon a revocable permit, we pointed out that his case was analogous to *Mitchell Arms*:

> In *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 217 (Fed. Cir. 1993), we rejected the claim that the Bureau of Alcohol, Tobacco, and Firearms' decision to revoke a permit allowing the importation and sale of certain firearms constituted a taking of the claimant's right to use the permit for those purposes. We stated: "Mitchell's ability to import the rifles and sell them in the United States was at all times entirely subject to the exercise of ATF's regulatory power. Consequently, any expectation which arose on Mitchell's part as a result of the import permits did not constitute a property right protected by the Fifth Amendment." 7 F.3d at 217. Likewise, the drift gillnet regulation at issue here has banned a particular use of Mr. Conti's vessel and gear "which was not inherent in its ownership" and was "totally dependent upon the * * * permit issued by" the government. *Id.*

Id.

Mitchell Arms and *Conti* control this case. What allegedly was taken in *Mitchell Arms* was the right to import firearms and sell them in domestic commerce. What allegedly was taken in *Conti* was the right to harvest swordfish in the Atlantic Swordfish fishery using drift gillnets. In each case, the takings claim failed because what allegedly was taken was not one of the sticks in the bundle of rights that inhered

in ownership of the underlying *res*: in *Mitchell Arms*, certain firearms; in *Conti*, a fishing vessel. American Pelagic is in the same situation as the plaintiffs in *Mitchell Arms* and *Conti*. As discussed above, because the Magnuson Act assumed sovereignty for the United States over the management and conservation of the resources located in the EEZ, and specifically over fishery resources, American Pelagic did not have, as one of the sticks in the bundle of property rights that it acquired with title to the *Atlantic Star*, the right to fish for Atlantic mackerel and herring in the EEZ. American Pelagic thus did not possess the property right that it asserts formed the basis for its takings claim. In the absence of that property right, its claim is fatally defective.[21]

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[21] American Pelagic argues that *Maritrans, Inc. v. United States*, 342 F.3d 1344, supports its assertion of a property interest in the right to fish for Atlantic mackerel and herring in the EEZ. We do not agree. *Maritrans* involved a statute requiring, *inter alia*, that all single hull tank vessels, including tank barges, engaged in the marine transportation of oil and petroleum products in the navigable waters of the United States be either retrofitted with double hulls or phased out of service. The plaintiff, Maritrans, Inc. ("Maritrans") alleged that the statutory requirement constituted a taking of eight of its single hull tank barges that it had either retrofitted, scrapped, or sold as a result of the legislation. *Id.* at 1348-50. Addressing the threshold inquiry of whether Maritrans possessed a property interest in its barges, we held that it did. *Id.* at 1353. We did not hold, however, that Maritrans had a property interest in the use of its vessels on the navigable waters of the United States. Although we noted the governments contention that the property interest Maritrans asserted was the use of its vessels on the navigable waters of the United States, *id.*, we did not approach the case in terms of such an asserted interest. Rather, we explained that like Mr. Conti, Maritrans had a property interest in the vessels themselves. *Id.* ("Martirans has various rights in its barges that qualify them as property for Fifth Amendment purposes."). We then determined that the legislation did not effect a categorical taking

(cont'd)

CONCLUSION

For the foregoing reasons, we reverse the holding of *American Pelagic I* that the revocation of American Pelagic's permits and authorization letter constituted a taking under the Fifth Amendment. We therefore vacate the award of damages in *American Pelagic II*. The case is remanded to the Court of Federal Claims with the instruction that it enter judgment in favor of the United States.

COSTS

Each party shall bear its own costs.

Reversed, Vacated, and Remanded

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of Maritrans vessels, *id.* at 1353-55, and further, pursuant to the *Penn Central* analysis, that Maritrans did not suffer a noncategorical taking of its vessels, *id.* at 1356-59.

APPENDIX B

In the United States Court of Federal Claims

AMERICAN PELAGIC FISHING COMPANY, L.P.,

Plaintiff,

v.

The UNITED STATES, Defendant.

No. 99-119C.

April 4, 2001.

OPINION

BRUGGINK, Judge.

This is an action founded upon the Takings Clause of the Fifth Amendment to the United States Constitution. Plaintiff asserts that the enactment of legislation resulted in a temporary taking of plaintiff's fishing vessel. Pending are plaintiff's and defendant's cross-motions for summary judgment. Oral argument was held on November 21, 2000. After oral argument, the court requested supplemental briefing. For the reasons set forth below, plaintiff's motion is granted, and defendant's motion is denied.

FACTUAL BACKGROUND[1]

Plaintiff American Pelagic Fishing Company, L.P., ("APFC")[2] is a limited partnership that invested nearly $40

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[1] The relevant facts of this case are undisputed and are contained in plaintiff's proposed findings of fact and supporting appendices. Defendant stated that it was unable to respond to certain of plaintiff's proposed facts regarding the economic impact of the congressional legislation at issue here. It did not, however, request additional discovery under Rule of the Court of Federal Claims 56(g) because counsel believed that economic discovery had been prohibited. This was based on the following statement by the court at a prior oral argument: "If you say you need discovery or the Government does, and I'm talking about things other than damages, then I would hope you all could reach some agreement." Tr. Dec. 14, 1999, Oral Arg. at 75. This statement did not foreclose all economic discovery; the only discovery perhaps foreclosed by the court's statement was discovery relating solely to damages. The relevance of the economic impact of the legislation in question here is not limited to damages. The economic impact of the legislation is part of the liability inquiry in a regulatory takings case. Defendant could have responded, either substantively or by requesting additional discovery. Without either of these actions, the facts alleged by plaintiff regarding the economic impact of the legislation on its property are deemed established for purposes of determining liability. *See* Rule of the Court of Federal Claims 56(d)(3); *Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1561 (Fed. Cir. 1988); *Carolina Power & Light v. United States*, 48 Fed.Cl. 35, 41 n.4 (2000). We note, in any event, that if plaintiff in fact suffered no economic impact, it will not be able to prove damages.

We also note that we do not rely on paragraph 7 of the Supplemental Declaration of Lisa A. Kohlwes Torgersen. That paragraph improperly contains legal argument. It is hereby stricken from the record.

[2] APFC's immediate predecessor as owner of the Atlantic Star is the Atlantic Star Fishing Company. The owners of the Atlantic Star Fishing Company created APFC to finance the Atlantic Star project. For (cont'd)

million in a fishing vessel, a freezer trawler named the *Atlantic Star*, for the purpose of fishing for Atlantic mackerel and herring in the Exclusive Economic Zone ("EEZ") of the United States.[3] The *Atlantic Star*, a United States flag vessel when owned by plaintiff, was 369 feet in length and weighed over 6,900 gross tons. Each of its two engines was capable of producing 6,700 horsepower. The *Atlantic Star's* size enabled it to contain a larger cold storage facility than other participants in the Atlantic mackerel and herring fisheries. Its size did not, however, mean that it was capable of catching more fish than smaller vessels; a vessel's size does not have a direct relationship to the amount of fish that the vessel can catch. APFC planned to use the *Atlantic Star* to harvest Atlantic mackerel from December to May of each year and to harvest Atlantic herring year-round. Plaintiff expected the *Atlantic Star* to catch approximately 50,000 metric tons of fish per year.

Prior to purchasing the *Atlantic Star*, plaintiff researched the east coast Atlantic mackerel and herring fisheries. Plaintiff's research included consulting various government publications, in particular a study conducted by the United States International Trade Commission ("ITC") entitled "Mackerel: Competitiveness of the U.S. Industry in Domestic and Foreign Markets." The ITC study resulted from a request by the Senate Finance Committee, which was

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the sake of simplicity, the term "plaintiff" in this opinion shall include both APFC and the Atlantic Star Fishing Company.

[3] The Atlantic Star was acquired by plaintiff on November 14, 1996. The vessel underwent conversion and outfitting work in 1997, with the work being completed in November of that year. On July 6, 1999, plaintiff sold the Atlantic Star to its Dutch lenders.

concerned about the lack of development of the United States Atlantic mackerel resource. The ITC concluded, among other things, that the use of larger fishing vessels would offer economies of scale and would improve the competitive position of the United States Atlantic mackerel industry. Plaintiff relied on this study in developing the *Atlantic Star* project.

Plaintiff's considerations took place against the backdrop of the regulatory scheme governing the Atlantic mackerel and herring fisheries. Beyond state waters, out to the 200-mile limit of the EEZ, the federal government manages fishery resources. The federal regulatory scheme was established by the Magnuson Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. §§ 1801-1883 (1994 & Supp. III 1997).[4] The Magnuson Act confers primary federal management authority over marine fishery resources on the Secretary of Commerce and the National Marine Fisheries Service ("NMFS"), a subunit of the National Oceanic and Atmospheric Administration ("NOAA") within the United States Department of Commerce. Integral in the management of the fisheries within the EEZ are eight regional fishery management councils. These councils are charged with developing fishery management plans in accordance with national standards set forth in 16 U.S.C. § 1851. Once developed and approved by the Secretary of Commerce, a Fishery Management Plan ("FMP") is then promulgated by the NMFS. The relevant councils here are the Mid-Atlantic Fishery Management

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[4] In this opinion, all citations to the United States Code and the Code of Federal Regulations are to those codes as they existed in 1997.

Council ("MAFMC") and the New England Fishery Management Council ("NEFMC"). The MAFMC has management responsibility for Atlantic mackerel, and an FMP was in place for Atlantic mackerel at the time plaintiff was seeking entry to that fishery. The NEFMC has management responsibility for Atlantic herring. An FMP was not in place for Atlantic herring at the time plaintiff sought entry to that fishery.

For several years prior to plaintiff's development of the *Atlantic Star* project, the NMFS had been making public statements that the herring and mackerel stocks were at high abundance levels and low levels of exploitation. Additionally, several documents published by the MAFMC in the years leading up to the *Atlantic Star* project discussed the need for large fishing vessels in the east coast industry. Each of these documents contained the following passage, relied upon by plaintiff in developing the *Atlantic Star* project:

> The key problem for the U.S. fishery remains that of Atlantic mackerel not being a desirable fish in the eyes of most American consumers, and transportation costs have been prohibitive in shipping this low-value, bulk product to foreign markets where it enjoys greater acceptance. In order to compete in the world bulk market, the U.S. industry will have to emulate its foreign competitors, which harvest, process and ship mackerel in large quantities to take advantage of economies of scale. * * * Currently the U.S. east coast industry does not have the large vessels necessary to participate in this market * * *.

In addition, in 1994 the NMFS had rescinded an earlier control date for the Atlantic mackerel fishery. The control date of August 13, 1992, had been intended to "preclude speculative entry into the mackerel fishery" by placing future entrants to the fishery on notice that they would not be

guaranteed future access to the Atlantic mackerel fishery should a management regime be implemented. 57 Fed. Reg. 36,384 (Aug. 13, 1992). This control date was rescinded on September 27, 1994, because the MAFMC no longer believed "that the Atlantic mackerel fishery will require the imposition of some type of limited-entry management system." 59 Fed. Reg. 49,235 (Sept. 27, 1994).[5]

For the years the *Atlantic Star* would have participated in the Atlantic mackerel and herring fisheries, the MAFMC proposed, and the NMFS approved, an Allowable Biological Catch ("ABC") for the Atlantic mackerel fishery. For Atlantic mackerel, the ABC for 1997 was 1,178,000 metric tons; the ABC for 1998 was 382,000 metric tons; and the ABC for 1999 was 383,000 metric tons. These limits were based on the best scientific information available to the NMFS. The United States commercial landings of Atlantic mackerel in the years listed were as follows: 15,706 metric tons in 1997, 12,513 metric tons in 1998, and 12,050 metric tons in 1999.

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[5] Plaintiff alleges that it relied on the rescission of the control date for Atlantic mackerel when making its decision to invest in the *Atlantic Star*. Pl.'s Proposed Findings ¶ 54. However, this proposed finding cites only to a paragraph of the complaint, ¶ 30, that was denied by defendant. Furthermore, there is no documentary evidence supporting this finding. Pursuant to Rule of the Court of Federal Claims 56(d)(3), this court cannot deem a fact established that is not "adequately supported." This support cannot come from a party's own pleading. Rule of the Court of Federal Claims 56(d)(1) ("Each paragraph [of the Proposed Findings of Uncontroverted Fact] shall contain citations to the opposing party's pleadings or to documentary evidence, such as affidavits or exhibits, filed with the motion or otherwise part of the record in the case.").

In its draft FMP for the Atlantic herring fishery,[6] the NEFMC has proposed an ABC of 300,000 metric tons. The United States commercial landings of Atlantic herring for the past several years were as follows: 89,415 metric tons in 1996, 95,715 metric tons in 1997, and 81,512 metric tons in 1998.

Plaintiff relied on these figures in making its decisions regarding the *Atlantic Star* project. As a result of its research, plaintiff concluded that an investment in the Atlantic mackerel and herring fisheries would be reasonable, low risk, and profitable. Consequently, plaintiff purchased the *Atlantic Star* and set about converting the vessel in Norway for use in the Atlantic mackerel and herring fisheries of the EEZ.

Plaintiff also applied for the necessary fishery permits and gear authorizations. Under 50 C.F.R. § 648.4(a)(5), a fishing vessel must have and carry on board a valid Atlantic mackerel permit in order to fish for, possess, or land Atlantic mackerel in or from the EEZ. Under 50 C.F.R. § 648.4(e)(1), the Regional Administrator for NMFS must issue the permit within 30 days of receipt of the application. Additionally, because of the possibility that Northeast Multispecies (Nonregulated) fish might be caught as incidental by-catch, plaintiff applied for a Northeast Multispecies (Nonregulated) permit. Finally, vessels harvesting Atlantic mackerel and herring in the Gulf of Maine/Georges Bank Regulated Mesh Area with midwater trawl gear of mesh size less than that normally required by the regulations were required to carry

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[6] This draft FMP was partially approved by the Secretary of Commerce on October 27, 1999.

on board an authorization letter issued by the Regional Administrator pursuant to 50 C.F.R. § 648.80(d).

The fishing permits were initially issued by the Northeast Regional Office of NMFS to the vessel as owned by the Atlantic Star Fishing Company on February 5, 1997, and were re-issued to the vessel as owned by APFC on April 8, 1997, and April 12, 1997, after ownership of the vessel had passed to APFC. The permit number remained the same after transfer, and the permits granted were the following:

1. Federal Fisheries Permit # 610018, for Atlantic mackerel and *Illex* squid and for incidental *Loligo* squid and butterfish, with an expiration date of December 31, 1997; and

2. Federal Fisheries Permit # 610018, for Northeast Multispecies (Nonregulated), with an expiration date of April 30, 1998.

On August 28, 1997, the regional office of NMFS also issued to the *Atlantic Star* a Gulf of Maine/Georges Bank Midwater Trawl Gear Authorization letter for Atlantic herring, blueback herring, mackerel, and squid. The letter had an expiration date of April 30, 1998.

As news of the *Atlantic Star* project spread, local commercial opposition to the vessel's entry into the Atlantic mackerel and herring fisheries began to form. At a joint meeting of the Atlantic Herring Section and the NEFMC Herring Committee in March 1997, potential restrictions on vessel specifications were discussed. The concern about the *Atlantic Star* was obvious. One attendee at the joint meeting stated, "There's a U.S. boat in Norway that will have a 300 ton daily capacity. There's room for growth in the herring and mackerel fishery but not this much growth and not at this pace without severely impacting the current herring and mackerel fishery. We need to keep this fishery local." A motion was made to discuss, at the next meeting, placing a

limit of 150-160 feet and 2500 horsepower on fishing vessels. To this motion, one of the meeting's participants responded that a limit of 170 feet and 3000 horsepower would be a "good limit" because he was refitting a 165 foot boat for participation in the fishery.

The concerns expressed at the March 1997 Joint Meeting were echoed in H.R. 1855, introduced in the United States House of Representatives on June 10, 1997. This bill proposed to establish a moratorium on large fishing vessels in the Atlantic mackerel and herring fisheries. A large fishing vessel was defined as "a fishing vessel * * * of the United States that is equal to or greater than 165 feet in length overall and has an engine of more than 3,000 horsepower." Hearings on the bill were held on June 26, 1997, before the House Subcommittee on Fisheries Conservation, Wildlife and Oceans. The *Atlantic Star* project was specifically discussed at these hearings. *See Fish and Wild Life Issues: Hearing on H.R. 1855 Before the House Subcomm. on Fisheries Conservation, Wildlife and Oceans*, 105th Cong. (1997). Michael Love, general manager of the *Atlantic Star*, testified against the bill and stated that, to the best of his knowledge, plaintiff owned the only vessel "that would be kept out by the bill in its present form." *See id.* at 1997 WL 11234446. The bill passed the House on July 28, 1997.

In September 1997, the NMFS announced a new control date for the Atlantic mackerel fishery. The control date was issued to provide notice to anyone "entering the commercial Atlantic mackerel fishery after September 12, 1997," that they would "not be assured of future access to the Atlantic mackerel resource in Federal waters if a management regime is developed and implemented" under the Magnuson Act. 62 Fed. Reg. 48047 (Sept. 12, 1997). "The potential eligibility criteria [in the future might] be based on historical participation [in the fishery], defined as any number of trips

having any documented amount of Atlantic mackerel landings." *Id.* The rationale given for the new control date was as follows:

> Discussion of reinstatement of a control date was prompted by news that a large factory trawler[7] was undergoing conversion to enter this fishery. Council members noted that, although the fishery is currently underexploited, a substantial increase in exploitation could be effected in a short period of time by the introduction of a factory trawler fleet. To prevent overcapitalization, Council members expressed the need to implement a management program for this fishery that allowed for controlled expansion * * *. The Council members noted that [the existing capital in the fishery], along with the possible addition of factory trawlers, raised concerns because the current estimate of long-term potential yield for this fishery is 150,000 [metric tons]. Further, both NMFS and the Council have indicated that first preference for entry into this fishery should be afforded to Northeast region vessels as an alternative to traditional fisheries that have been severely overfished.

Id.[8]

Also in September 1997, a bill paralleling H.R. 1855 was introduced in the United States Senate. That bill, S. 1192,

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[7] To be precise, the *Atlantic Star* was not a factory trawler; it was a freezer trawler. A freezer trawler only freezes the fish it catches; it does not otherwise process them.

[8] At the time this lawsuit was filed, no rule had been adopted limiting access to the fishery.

provided for the revocation of Atlantic mackerel or herring permits that had been issued to vessels "165 feet in length or longer" or possessing "an engine or engines capable of producing a total of more than 3,000 horsepower." In introducing the bill, Senator Olympia Snowe, although not naming the *Atlantic Star*, undoubtedly spoke of the vessel when referring to the "369 foot factory trawler" entering the Atlantic mackerel and herring fisheries as a "dramatic new proposal * * * which could alter the planned course of sustainable development for these fisheries." 143 Cong. Rec. S9637-01, S9644 (Sept. 18, 1997).

Neither H.R. 1855 nor S. 1192 was enacted into law. In fact, the NMFS and NOAA questioned the wisdom of legislatively revoking plaintiff's permits; the general position of the NMFS was that the regional fishery management councils were the appropriate entities to consider limits on fisheries permits.

Nevertheless, Congress achieved the purpose of H.R. 1855 and S. 1192 through a rider attached to the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. 105-119, which was enacted on November 26, 1997 ("1997 Appropriations Act"). Section 616 of the 1997 Appropriations Act provided as follows:

> (a) None of the funds made available in this Act may be used to issue or renew a fishing permit or authorization for any fishing vessel of the United States greater than 165 feet in registered length or of more than 750 gross registered tons, and that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower—
>
> (1) as specified in the permit application required under part 648.4(a)(5) of title 50, Code of Federal Regulations, and the authorization required under part 648.80(d)(2) of

> title 50, Code of Federal Regulations, to engage in fishing for Atlantic mackerel or herring (or both) under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.); or
>
> (2) that would allow such a vessel to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United States (except territories), unless a certificate of documentation has been issued for the vessel and endorsed with a fishery endorsement that was effective on September 25, 1997 and such fishery endorsement was not surrendered at any time thereafter.
>
> (b) Any fishing permit or authorization issued or renewed prior to the date of the enactment of this Act for a fishing vessel to which the prohibition in subsection (a)(1) applies that would allow such vessel to engage in fishing for Atlantic mackerel or herring (or both) during fiscal year 1998 shall be null and void, and none of the funds made available in this Act may be used to issue a fishing permit or authorization that would allow a vessel whose permit or authorization was made null and void pursuant to this subsection to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United States.

The rider, in short, retroactively cancelled plaintiff's existing permits and authorization letter and prospectively precluded re-issuance of such permits. It is undisputed that the only immediate impact of the rider was to invalidate the *Atlantic Star*'s current fishing permits. No other vessels were affected by the legislative revocation.

An identical provision, applicable to the following fiscal year, was enacted on October 21, 1998, as § 617 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999, Pub. L.

105-277 ("1998 Appropriations Act"). Finally, on May 21, 1999, Congress enacted § 3025 of the 1999 Emergency Supplemental Appropriations Act, Pub. L. 106-31, ("1999 Appropriations Act") which amended § 617 of the 1998 Appropriations Act and made the vessel-size limitation and permit revocation permanent:[9]

> Section 617 of [the 1998 Appropriations Act] is amended—
>
> (1) by striking subsection (a) and inserting the following:
>
> "(a) None of the funds made available in this Act or any other Act hereafter enacted may be used to issue or renew a fishing permit or authorization for any fishing vessel of the United States greater than 165 feet in registered length, of more than 750 gross registered tons, or that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower as specified in the permit application required under part 648.4(a)(5) of title 50, Code of Federal Regulations, part 648.12 of title 50, Code of Federal Regulations, and the authorization required under part 648.80(d)(2) of title 50, Code of Federal Regulations, to engage in fishing for Atlantic mackerel or herring (or both) under the Magnuson-Stevens Fishery Conservation and Management Act (16

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[9] In the time since this lawsuit was filed, the MAFMC and NEFMC have recommended, and the NMFS has promulgated, regulations reflecting the statutory prohibition. *See* 64 Fed. Reg. 57587-01 (Oct. 26, 1999) (imposing vessel-size limitations on vessels engaged in the Atlantic mackerel fishery); 65 Fed. Reg. 77450 (Dec. 11, 2000) (imposing vessel-size limitations on vessels engaged in the Atlantic herring fishery).

U.S.C. 1801 et seq.), unless the regional fishery management council of jurisdiction recommends after October 21, 1998, and the Secretary of Commerce approves, conservation and management measures in accordance with such Act to allow such vessel to engage in fishing for Atlantic mackerel or herring (or both).."; and

(2) in subsection (b), by striking "subsection (a)(1)" and inserting "subsection (a)".

This legislative approach to the revocation of fishery permits and authorization letters was unique. Never before had the NMFS revoked a fishery permit in response to a Congressional appropriation act. Congress did not consult with United States fishery officials before deciding to nullify the *Atlantic Star*'s permits or ask those officials to recommend or consider alternatives. Congress did not ask the NMFS what its opinion would be regarding the revocation of a fishing permit by act of Congress. The size thresholds established by the legislation were developed by Congress and not by the NMFS. Furthermore, in a deposition taken in this case, the government's own stock assessment scientist for Atlantic mackerel and herring stated that the *Atlantic Star*'s entry into the Atlantic mackerel and herring fisheries would have had no negative impact on either species.

Congress's action also differed from previous legislative programs to reduce fishing capacity. In the past, the government has paid owners when it sought to obtain their permits and remove their vessels from fishing. For example, a fishing capacity reduction program was created by the Sustainable Fisheries Act, Pub. L. 104-297, enacted on October 11, 1996. This legislation authorizes the Secretary of Commerce to pay the owner of a fishing vessel if the vessel is withdrawn from a particular fishery; it also authorizes the Secretary to pay the owner of a fishing permit

if the permit is surrendered for permanent revocation. Pursuant to this legislation, the Secretary of Commerce may implement a fishing capacity reduction program if certain statutory criteria are met; these criteria include finding that the program is necessary to "prevent or end overfishing," finding that the program is consistent with the "Federal or State fishery management plan," and finding that the program is "cost-effective." 16 U.S.C. § 1861a(b)(1). This reduction program is voluntary, and its objective is "to obtain the maximum sustained reduction in fishing capacity at the least cost and in a minimum period of time." 16 U.S.C. § 1861a(b)(2). Plaintiff was aware of this prior practice. The legislation revoking the *Atlantic Star*'s permit and authorization letter was not voluntary and did not provide for any compensation to the owners.

The *Atlantic Star* was the only vessel to have its Atlantic mackerel permit and gear authorization letter revoked because of the 1997 Appropriations Act. Because of the revocation of its Atlantic mackerel permit, the *Atlantic Star* could not lawfully participate in the Atlantic mackerel fishery from the beginning of December 1997 until July 1999 when plaintiff sold the *Atlantic Star*. Furthermore, because of the prohibition on issuing any other fishing permits, the *Atlantic Star*, during this period, could not participate in any other United States fisheries in the EEZ for which permits were required. But for the revocation of its permit and authorization letter by these enactments, the *Atlantic Star* would have fished for Atlantic mackerel and herring in 1997, 1998, and 1999. No regulations of general application were promulgated in 1997 or 1998 that would have prevented the *Atlantic Star* from fishing for Atlantic mackerel if its fisheries permit had not been rendered null and void by Congress.

With the *Atlantic Star* unable to participate in the fisheries for which it was intended or in any other fisheries in

the EEZ requiring a permit, the economic value of the vessel was dramatically reduced. Although, even after the enactment of the 1997 Appropriations Rider, the *Atlantic Star* could have fished solely for Atlantic herring in non-closed waters with midwater trawl gear, it would not have earned a profit doing so. The profitability of the *Atlantic Star* depended upon its ability to fish for Atlantic mackerel, with or without the gear authorization letter.[10] There are no fisheries in existence in waters of the United States not requiring a fishery permit in which the *Atlantic Star* could have participated on a profitable basis.[11] Furthermore, there are no commercially-marketable fish beyond the 200 mile limit of the EEZ that can be economically harvested by a pelagic mid-water trawler such as the *Atlantic Star*. The *Atlantic Star* had the capability to fish in foreign waters but not on an economically viable basis. The *Atlantic Star* was a United States flagged vessel and, as such, could not participate in foreign fisheries without purchasing fishing rights. These foreign fishing rights are typically very

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[10] For this reason, the use the court shall consider in its analysis is the use of the *Atlantic Star* to fish for mackerel.

[11] Defendant did not agree with this proposed finding and stated, "There were other fisheries within the EEZ of the United States which the *Atlantic Star* could have fished without a permit or gear authorization." Def.'s Stmt. Genuine Issues ¶ 152. This statement is non-responsive to plaintiff's proposed finding. Plaintiff did not allege that there were no fisheries available to it at all; rather, it alleged that there were no fisheries available to it in which it could make a profit. Plaintiff supported this statement with the Declaration of Lisa A. Kohlwes Torgersen. Consequently, defendant has failed to identify a genuine dispute regarding this fact.

expensive. Furthermore, reflagging the vessel in a foreign country would have permanently barred the *Atlantic Star* from ever participating in American fisheries as a United States flagged vessel.

Plaintiff could not convert the *Atlantic Star* to any non-fishing use because of the specialized fishing and freezing equipment on board the vessel. Conversion would have required the removal of this equipment, and this removal only could have been accomplished at a high cost. Additionally, removal of this freezing equipment would have destroyed the value of the vessel and the investment plaintiff made in it. Plaintiff would no longer have had a fishing vessel, and nothing would have been left of the investment in the vessel for the purpose of fishing.

In response to the revocation of its permit and authorization letter, plaintiff filed a lawsuit in the U.S. District Court for the District of Columbia, challenging the constitutionality of the government's action and seeking a preliminary injunction against enforcement of the appropriations provisions. The district court denied the request for a preliminary injunction. On March 9, 1999, plaintiff filed this lawsuit alleging an uncompensated taking. On July 9, 1999, plaintiff sold the vessel to its Dutch lenders. On November 29, 1999, the district court action was dismissed as moot because plaintiff no longer owned the *Atlantic Star*. This court must now determine whether the Fifth Amendment's Takings Clause provides a basis for granting plaintiff relief.

DISCUSSION

The Fifth Amendment to the United States Constitution prohibits the federal government from taking private property without just compensation. This is not an abstract guarantee. It is an immensely practical device to protect the rights of the individual when faced with collective action. In this

connection, the present facts are deeply disturbing. It is undisputed that plaintiff's owners undertook, virtually at government invitation, to invest substantial resources in the vessel. They did everything required of them at the time to comply with the existing regulatory regime to ensure that the *Atlantic Star* could be used for commercial fishing. Congress put those regulations in place and entrusted to the NMFS their enforcement, including the ground rules for possible revocation. Although the court has misgivings about the rationale for what Congress then did, it will be assumed that Congress had good and sufficient reasons for revoking only the *Atlantic Star*'s permits, and thereby making the regulatory scheme uniquely unavailable to the vessel. The impact was the same. The investment, reasonably undertaken under the circumstances, was compromised in an instant. What makes the facts particularly troublesome is that, under existing precedent, it is far from clear that the Takings Clause is implicated. If that is the case, however, the result would undermine fundamental assumptions as to the government's rights vis a vis private property.

As nothing was physically taken or destroyed, plaintiff asserts a regulatory taking of personal property. The beginning of the application of the Takings Clause to other than physical takings is often traced to Holmes's observation that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). He pointed out that "[w]hen this seemingly absolute protection [the Takings Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.* From this, the Court has held that land use regulation will constitute a taking if it "denies an owner

economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

This regulatory takings analysis has frequently been tested in the context of the regulation of real estate. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The rule is relatively clear. If the regulation destroys *all* economically viable use of the land, *i.e.*, if the owner has been "called upon * * * to leave his property economically idle," there is a compensable taking *per se*. *Lucas*, 505 U.S. at 1019. If the destruction of use is less than complete, the court engages in an "essentially ad hoc, factual inquiry" that includes analysis of three factors: the extent to which the governmental action interferes with distinct, investment-backed expectations; the character of the governmental action; and the extent of economic impact on the claimant. *Penn Cent.*, 438 U.S. at 124. As the Court explained in *Penn Central*, the focus in less-than-total destruction of use claims is "on the uses the regulations permit." *Id.* at 131.

The *Penn Central* analysis for identifying a regulatory taking also has been applied in the context of personalty. In *Andrus v. Allard*, 444 U.S. 51 (1979), the Court used the three-part analysis when considering a prohibition on the sale of Indian artifacts containing eagle feathers. It held that "the denial of one traditional property right does not always amount to a taking. At least where the owner possess a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id.* at 65-66. In the circumstances, it found that the prohibition on use was not complete, nor was "it clear that appellees [would] be unable to derive economic benefit from the artifacts." *Id.* at 66.

In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Court launched the *Penn Central* three-part

regulatory takings analysis into new waters: intangible personalty. That case involved the legislative creation of an obligation to private third parties, in a way arguably inconsistent with prior contract rights and obligations. The court rejected the takings claim, concluding that the Fifth Amendment is not implicated merely because Congress chooses to require one person to benefit another. The government had not occupied or destroyed the employer's property, the penalty for withdrawal was not out of proportion to the company's experience with the plan, and pension plans had long been subject to regulation. *Id.* at 226-27.

A more recent claim of regulatory taking involving intangible personalty is *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). A plurality of the Court applied the Takings Clause to strike down (rather than require compensation for) legislation that, in the majority's view,[12] created a liability from one private entity to another based on past actions. In short, the legislation was retroactive in effect. It created financial obligations in companies presently or previously engaged in coal mining to present or former employees or their families.

The plurality begins its analysis with a recognition that the Takings Clause has potential application to economic regulation affecting personalty. *Eastern Enterprises*, 524 U.S. at 523. It then calls attention to the relevance of the "justice and fairness" of the governmental action in

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[12] Justice Kennedy created a majority in remedy by agreeing that the retroactive nature of the liability was problematic, though because of the Due Process Clause rather than the Takings Clause.

determining whether a taking has occurred. *Id.* (citing *Andrus*, 444 U.S. at 65. In implementing that inherently factual and ad hoc inquiry, the plurality uses the three *Penn Central* factors. *Id.*

Positing the power of Congress to "adjust the burdens and benefits of economic life," *id.* at 524 (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (a challenge based on due process)), the plurality nevertheless concluded that "[o]ur decisions have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of persons that could not have anticipated the liability, and the extent of the liability is substantially disproportionate to the parties' experience." *Id.* at 528-29. In applying these factors, the plurality used the familiar *Penn Central* template to conclude that the medical benefits legislation at issue constituted a taking: the economic impact, while not confiscatory, was "substantial"; the plaintiff had good reason not to anticipate the imposition, thus it had a reasonable, investment-backed expectation that the retroactive legislation would not have been adopted; and finally, the targeted nature of the legislation made the character of the government action appear to be a taking.

Justice Kennedy disagreed with the takings analysis because he could find no clearly identified, traditional, property interest. *Id.* at 544 (Kennedy, J., concurring in the judgment and dissenting in part). He believed the legislation to be constitutionally defective, however, on due process grounds, because the remedy imposed by the legislation bore no legitimate relationship to the interests asserted by the government in its support. He, too, was troubled by the retroactive, targeted nature of the legislation. *Id.* at 549.

From these decisions, we deduce that the Takings Clause has applicability to both tangible and intangible personalty.

The relevant test for a regulatory taking in such circumstances is the now-traditional *Penn Central* three part analysis. Despite the plurality in *Eastern Enterprises*, however, what has not changed is the need to identify the "property" allegedly taken for public use, because the Takings Clause only protects juridically recognized property interests. *See M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995). In this case, from the standpoint of traditional property concepts, the *res* potentially taken by the government was the ship itself. Licenses or permits are traditionally treated as not protected by the Takings Clause because they are created by the government and can be cancelled by the government and normally are not transferrable.

The *Atlantic Star, qua* ship, plainly constitutes property for Fifth Amendment purposes, as the government concedes. Here, however, the owner was left with the ship; it was not physically taken. Instead, restrictions merely were placed on its use. That is not fatal to a takings claim, however. As evident from *Lucas*, the Fifth Amendment contemplates that compensation is owed when government, by regulation, so completely destroys the beneficial uses of property that it is, in effect, idled. This focus on the vessel thus distinguishes the facts from cases dealing with claims that the permits at issue were property in themselves. *See Bradshaw v. United States*, 47 Fed.Cl. 549, 553 (2000) ("A grazing permit * * * was never intended to become a property right."); *Hage v. United States*, 35 Fed.Cl. 147, 171 (1996) ("reliance on the privilege to graze * * * [cannot] create a property interest."). The question in this case thus becomes: are the uses prohibited within the bundle of rights otherwise inherent in the vessel?

As this court noted in a takings case involving the use of vessels to carry oil and hazardous substances: "The inquiry is not so simple as examining whether the Government

prevents the exercise of a property right by regulating it, transforming the property right into one 'totally dependent' on the Government's regulatory regime. That is a tautology; the inquiry is considerably more nuanced." *Maritrans, Inc. v. United States*, 40 Fed.Cl. 790, 796 (1998). To determine whether a property right exists independent of the regulatory scheme, it is necessary to decide "whether an independent or preexisting right of use under common law applies." *Id.* at 798; *see also Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 217 (Fed. Cir. 1993).

The relevant stick in the bundle in this context is the right to use the *Atlantic Star* to fish, subject to regulation. The government argues that the use of the vessel to fish in the EEZ was entirely dependent upon the government's regulatory scheme. We can assume for argument's sake that the government's assertion is correct without terminating the analysis. To say that the plaintiff's rights to fish were subject to a pervasive regulatory scheme—plainly they were—is not to say that nothing the government did with respect to those rights could ever implicate the Takings Clause.

We are not confronted here with a property or a use which is inherently dangerous or a nuisance. There is nothing in the nature of a fishing vessel that suggests that any use is totally a matter of governmental grace. This distinguishes the facts at the outset from cases cited such as *Mugler v. Kansas*, 123 U.S. 623 (1887), and *Miller v. Schoene*, 276 U.S. 272 (1928). Absent such a built-in limitation, personal property, like land, comes with an inherent right of use. We note that the right to use is one of the "group of rights inhering in the citizen's relation to [a] physical thing." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945); *see also Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 (4th Cir. 1998) (identifying the right of use as one

of the "classical property rights"). As this court has held, "Inherent in the ownership of vessels is the right to use them." *Maritrans*, 40 Fed.Cl. at 799.

The nature of the use involved—fishing—also distinguishes this case from two other decisions relied on heavily by defendant. The Federal Circuit in *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir. 1988), found no taking where the government, in light of a Presidential ban on the recycling of spent plutonium, refused to issue an operating license to a plant designed for that purpose. The ban was issued in the interest of national security, and the court held that the Fifth Amendment provided no protection to one "who proposed use of property injurious to common defense." *Allied-General*, 839 F.2d at 1576.

Mitchell Arms, Inc. v. United States, 26 Cl. Ct. 1 (1992), aff'd, 7 F.3d 212 (Fed. Cir. 1993), concerned the suspension of import licenses for semiautomatic, assault-type rifles. The suspension of these licenses resulted in the plaintiff's loss of "the opportunity to sell the assault rifles in their original configuration." *Mitchell Arms*, 26 Cl.Ct. at 4. The plaintiff alleged that loss of this opportunity amounted to a taking without just compensation. This court rejected the argument, finding that the "right to sell assault weapons in domestic commerce [ ] is not a right inherent in plaintiff's ownership of those weapons." *Id.* at 6.[13]

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[13] *Mitchell Arms* distinguished *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990), in which the court had found a taking of a right to mine uranium. The *Mitchell Arms* court recognized that the right to mine was "inherent in the ownership rights that United

(cont'd)

Fishing, however, can hardly be equated to "the novelty of nuclear fission" and "the fearsome effect of its use in war," *Allied-General*, 839 F.2d at 1577, or to the importation of assault rifles. Fishing and fission only sound alike. The use claimed—fishing—is not as transparently a matter of official grace. For that reason, the present facts are more akin to decisions dealing with what expectations can accrue in a "highly regulated" but otherwise innocuous business.

This is not inconsistent with the recent decision of this court in *Conti v. United States*, 48 Fed.Cl. 532 (2001). The plaintiff in *Conti* alleged that an NMFS regulation prohibiting the use of drift gillnets in the Atlantic swordfish fishery had taken his property interest in the use of those gillnets without compensation. In the opinion in *Conti*, Judge Margolis concluded that a participant in the Atlantic swordfish fishery did not possess a property interest in the continued use of gillnets in that fishery; therefore, no taking had occurred. *Conti* is distinguishable. There was no revocation of any of Conti's existing permits by any government body, nor was there any denial of future permits. The decision to implement the gillnet moratorium was made by the NMFS, not Congress. The restriction was limited to a particular use of plaintiff's boat, not, as here, effectively all uses. Importantly, there was no allegation that the plaintiff was being singled out. The court's analysis, moreover, focused on the permit itself as the relevant property interest. The court stated, "[P]laintiff's reliance on his permit cannot confer a property interest upon him," and agreed with the government's assertion that "fishery permits do not create property interests." *Conti*, 48 Fed.Cl. at 538; *see also* 16

Nuclear * * * held independent of their denied permits." *Mitchell Arms*, 26 Cl.Ct. at 6.

U.S.C. § 1853(d)(3)(D). The question the court addresses here is framed differently: whether the legislation took all economically beneficial use of the ship.[14]

Defendant also points the court to *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986). In *Bowen*, the Court considered whether the State of California, based on an agreement with the federal government pursuant to a federal statute, possessed a protected property right to withdraw from the Social Security scheme. The Court rejected California's argument and held that the " 'contractual right' at issue in this case bears little, if any resemblance to rights held to constitute 'property' within the meaning of the Fifth Amendment." *Bowen*, 477 U.S. at 55. This finding was based on the fact that "the termination provision in the Agreement exactly tracked the language of the statute, conferring no right on the State beyond that contained in [the statute] itself." *Id.* The subsequent legislation, in short, took away what prior legislation had created. The facts here are plainly different, for reasons already cited. Fishing as a livelihood is not a creation of the government. We conclude that plaintiff possessed a property interest in using its vessel to fish, albeit subject to the regulatory regime. We must now decide whether the particular facts of this case constitute a taking in the context of the three-part *Penn Central* test.

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[14] We note also that the court in *Conti* did not address the revocation of existing permits.

1. Interference with Distinct, Investment-Backed Expectations

In the years leading up to the time plaintiff purchased the *Atlantic Star* and began investing money in its conversion to a pelagic trawler, the NMFS and the ITC expressly stated that there was a need for larger fishing vessels in the Atlantic mackerel fishery. In 1994, the NMFS had rescinded a control date for Atlantic mackerel because the MAFMC no longer believed "that the Atlantic mackerel fishery [would] require the imposition of some type of limited-entry management system." 59 Fed. Reg. 49,235 (Sept. 27, 1994). Furthermore, the ABC for Atlantic mackerel in 1997, 1998, and 1999 far exceeded the U.S. commercial landings of Atlantic mackerel in those years. For example, in 1997, the ABC for Atlantic mackerel was 1,178,000 metric tons, but the U.S. commercial landings amounted to only 15,706 metric tons. Plaintiff planned to catch 50,000 metric tons of Atlantic mackerel *and* herring per year. Thus, plaintiff reasonably believed there was ample room in the Atlantic mackerel fishery for the *Atlantic Star*.

Pursuant to the regulatory scheme, a permit had already been issued to the *Atlantic Star* at the time the 1997 Appropriations Act was enacted. The plaintiff was therefore legally entitled to use the *Atlantic Star* to fish for Atlantic mackerel in the EEZ. Under the regulations, this entitlement could only be revoked for cause. The regulations created certain expectations in both applicants and permit holders. The NMFS, for instance, did not have discretion regarding the issuance and renewal of Atlantic mackerel permits. The NMFS must "issue a permit within 30 days of receipt of the application, unless the application is deemed incomplete" for one of five reasons:

> (i) The applicant has failed to submit a complete application * * *;

(ii) The application was not received by the Regional Administrator by the applicable deadline set forth in this section;

(iii) The applicant and applicant's vessel failed to meet all applicable eligibility requirements set forth in this section;

(iv) The applicant applying for a limited access multispecies combination vessel or individual DAS permit, a full-time or part-time limited access scallop permit, or electing to use a VTS, has failed to meet all of the VTS requirements * * *; or

(v) The applicant has failed to meet any other application requirements stated in this part.

50 C.F.R. § 648.4(e)(1). Moreover, as long as a fishing vessel to which a mackerel permit has been issued is in compliance with the laws and regulations administered by the NMFS, the NMFS is required to issue a renewal permit to that vessel within 30 days of receipt of the owner's renewal application. It is also uncontroverted that, but for the revocation of its permit by Congress, the *Atlantic Star* would have fished for Atlantic mackerel in 1997, 1998, and 1999. No regulations were promulgated in 1997 or 1998 that would have prevented the *Atlantic Star* from obtaining a permit to fish for Atlantic mackerel. Furthermore, plaintiff was aware that, in the past, buyback programs such as that created by Sustainable Fisheries Act, Pub. L. 104-297, had been established when the government desired to reduce fishing capacity.

Plaintiff's expectation of being able to use its vessel to fish for Atlantic mackerel was thus reasonable. Indeed, the government, through the NMFS and the ITC, induced plaintiff to make its investment in the *Atlantic Star*. The government cannot now argue that reliance by plaintiff on the government's own statements was unreasonable.

Plaintiff could not assume that the regulatory regime would remain static, but it had no reason to anticipate that Congress would render the regulatory regime *uniquely* unavailable to it. Plaintiff could not have anticipated that Congress would single it out to revoke its permits by legislation.

In a regulated industry, government, through the implementation of a regulatory scheme, helps set the parameters for the reasonable expectations of investors. *See Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (considering the "regulatory climate that existed when Appellant acquired the subject property" in discussing reasonable expectations); *Branch v. United States*, 69 F.3d 1571, 1582 (Fed. Cir. 1995) (considering the "historical practices in the bank regulatory field" in discussing reasonable expectations); *Atlas Corp. v. United States*, 895 F.2d 745, 758 (Fed. Cir. 1990) (citing *Connolly*, 475 U.S. at 227 (quoting *FHA v. Darlington, Inc.*, 358 U.S. 84, 91, (1958)) (emphasis added) (" ' "Those who do business in the regulated field cannot object if the legislative scheme is *buttressed* by subsequent amendments to achieve the legislative end." ' "); *Am. Cont'l Corp. v. United States*, 22 Cl.Ct. 692, 697 (1991) (emphasis added) ("[E]xpectations must be based not only on then-existing federal regulations but also on the recognition that there may well be *related* changes in the regulations in the future."). And Congress, of course, retains the authority to change or even abolish that scheme. The mere fact of regulation, however, does not signify that an investor can never form a reasonable expectation of a return on his investment.

Moreover, having established a particular regulatory scheme, there are limits imposed by the Fifth Amendment to the actions Congress can take in regard to that regulatory scheme without compensating investors who have reasonably relied on the scheme. Plaintiff, when considering entry to the fisheries, could have reasonably anticipated a certain range of

future governmental regulation, duly promulgated through the regulatory scheme Congress established. Plaintiff perhaps also could have reasonably foreseen legislation that would limit, in a way applicable to others similarly situated, the issuance of future permits. The targeted revocation of existing permits, however, and the targeted denial of future permits by Congress were not events any citizen in a constitutional republic could have reasonably expected.[15] In short, at the time plaintiff made its investment in the *Atlantic Star*, its expectation of participating in the Atlantic mackerel fishery was reasonable.

2. Degree of Economic Impact[16]

The economic impact on plaintiff of the appropriations riders was severe. Plaintiff spent nearly $40 million on the *Atlantic Star* specifically to equip it to participate in the Atlantic mackerel and herring fisheries. With the enactment of the riders, this investment was wiped out. The *Atlantic Star* could not profitably operate without the permits that were revoked and denied by Congress; the appropriations riders prohibited all profitable uses of the vessel.

The fact that all profitable uses of the *Atlantic Star* were prohibited distinguishes this case from *Andrus v. Allard*, 444

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[15] The retroactivity and targeted nature of the legislation shall be addressed in the discussion of the character of the governmental action.

[16] As previously noted, defendant did not respond to plaintiff's proposed findings of fact regarding the economic impact of the legislation. For the reasons already discussed, we therefore deem established the facts alleged by plaintiff and supported by the evidence contained in the appendices accompanying plaintiff's motion.

U.S. 51. In that case, the U.S. Supreme Court determined that a prohibition on the sale of Indian artifacts containing eagle feathers did not effect a taking. As previously noted, this finding rested in part on the fact that "it [was] not clear that appellees [would] be unable to derive economic benefit from the artifacts." *Andrus*, 444 U.S. at 66. Here, the facts demonstrate the opposite conclusion: plaintiff was unable to derive any profitable economic benefit from the *Atlantic Star* after enactment of the appropriations riders. Although the vessel may have retained some scrap value, the government has not argued the possibility. In any event, the diminution in the vessel's value would have been virtually total. After the enactment of the appropriations riders, the *Atlantic Star* had no *commercially viable* uses.[17]

3. Character of the Governmental Action

The factor of "the character of the governmental action" has been cast in terms of whether the government physically appropriates the *res* or comes close to doing so. *See Penn Cent.*, 438 U.S. at 124.[18] The plurality opinion in *Eastern*

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[17] This severe economic impact also distinguishes the instant case from *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). In *Goldblatt*, the Court upheld an ordinance regulating dredging and pit excavating as a valid exercise of the police power not requiring the payment of compensation. This holding rested on the fact that there had been no evidence presented "which even remotely suggest[ed] that prohibition of further mining [would] reduce the value of the lot in question." *Goldblatt*, 369 U.S. at 594. Here, the evidence to the contrary is uncontested.

[18] In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), the court found that *Lucas* had changed this criterion, "from one in which courts * * * were called upon to make ad hoc balancing decisions, balancing private property rights against state regulatory (cont'd)

Enterprises, however, suggests that, in considering the character of a governmental action alleged to constitute a taking, at least two other factors are also relevant: (1) whether the action is retroactive in effect, and if so, the degree of retroactivity; and (2) whether the action is targeted at a particular individual. *Eastern Enterprises*, 524 U.S. at 532-37.[19] Both factors are present here.

The appropriations riders not only denied future permits but also voided the ones that had already been issued to the *Atlantic Star*. This revocation retroactively made the regulatory scheme established by the Magnuson Act unavailable to plaintiff. Plaintiff had complied with the scheme, but that compliance was retroactively rendered ineffective by Congress.

The disproportionate impact of the legislation is as severe as that at issue in *Eastern Enterprises*. In *Eastern Enterprises*, the plurality stressed the plaintiff's lack of responsibility for the "problem in the funding of retired coal miners' health benefits." *Eastern Enterprises*, 524 U.S. at 537. Here, there is no serious evidence that a problem in the Atlantic mackerel fishery even existed, and there is no evidence that plaintiff was uniquely responsible for any

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policy, to one in which state property law, incorporating common law nuisance doctrine, controls." *Loveladies Harbor*, 28 F.3d at 1179.

[19] The plurality's discussion of retroactivity seems to bridge its analysis of reasonable, investment-backed expectations and its analysis of the character of the governmental action. Because the question of whether plaintiff could have reasonably expected retroactive legislation and the question of whether retroactive legislation is of such a character as to support the finding of a taking appear to us to be two sides of the same coin, we discuss both retroactivity and targeting in our analysis of the character of the governmental action.

alleged problem. Without this evidence of responsibility, retroactively making the regulatory scheme unavailable to plaintiff has no support. This retroactivity favors finding a taking.

The circumstances here are different from those in *United States v. Locke*, 471 U.S. 84 (1985), where legislation was adopted revoking mining rights that were not perfected within a certain period of time: "As long as proper notice of these rules exists, and the burdens they impose are not so wholly disproportionate to the burdens other individuals face in a highly regulated society that some people are being forced 'alone to bear public burdens which, in all fairness and justice, must be borne by the public as a whole,' the burden imposed is a reasonable restriction on the property right." 471 U.S. at 107 n.15 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Here, there was no proper notice of the rules, the burdens imposed were disproportionately distributed, and one entity was singled out to bear "public burdens which, in all fairness and justice, must be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

All of the legislation in question here was clearly targeted at the *Atlantic Star*, as the predecessor bills to the appropriations riders indicate. As previously stated, Senator Snowe, when introducing S. 1192, referred to a "369 foot factory trawler" that was about to enter the Atlantic mackerel and herring fisheries; she was surely referring to the *Atlantic Star*. Furthermore, Congress was informed, during hearings regarding H.R. 1855, that the size prohibitions under consideration would affect only the *Atlantic Star* and no other vessels. Congressman Jack Metcalf of Washington also pointed out this fact:

> [APFC's] vessel, the *Atlantic Star*, is the only vessel that will be legislated out of existence—and into

> bankruptcy—by enactment of H.R. 1855. Such a result is not only bad fishery policy, it is bad Government policy and is manifestly unfair. We here in Congress should be trying to prevent Government takings of private property, not facilitating them, as this legislation most certainly does.

143 Cong. Rec. E1556-01 (1997).

The effect of the 1997 Appropriations Act was that only the *Atlantic Star*'s permits were revoked; the 1998 Appropriations Act and the 1999 Appropriations Act merely continued this legislative ban on the use of the *Atlantic Star*. The acts could not have achieved their objective any more fully if the *Atlantic Star* had been identified by name in the text of the acts. The character of the governmental action here, because that action, in both purpose and effect, was retroactive and targeted at plaintiff, supports the finding of a taking. Because the other two parts of the *Penn Central* test are also satisfied, we find that defendant took plaintiff's property interest in the use of its vessel to fish for Atlantic mackerel in the EEZ of the United States from the time the 1997 Appropriations Act was enacted until the time plaintiff sold its vessel.

CONCLUSION

Paragraph 7 of the Supplemental Declaration of Lisa A. Kohlwes Torgersen is hereby stricken. Plaintiff's motion for summary judgment on liability is granted. Defendant's motion for summary judgment is denied. On or before May 9, 2001, the parties shall file a joint proposed schedule for resolving remaining issues.

APPENDIX C

In the United States Court of Federal Claims

AMERICAN PELAGIC FISHING COMPANY, L.P.

Plaintiff,

v.

The UNITED STATES, Defendant.

No. 99-119C.

March 18, 2003.

OPINION

BRUGGINK, Judge.

American Pelagic Fishing Company ("APFC") brings this action pursuant to the Takings Clause of the Fifth Amendment. Liability was previously determined in favor of plaintiff in *American Pelagic Fishing Co., LP v. United States*, 49 Fed.Cl. 36 (2001) ("*American Pelagic I*"). Familiarity with the facts set out in that opinion is assumed. Trial on damages was held in Washington, D.C. on December 2-11, 2002. For the reasons set out below, we accept, with some adjustments, plaintiff's proof of required compensation.

PROCEDURAL HISTORY

Plaintiff, APFC, is a limited partnership, wholly owned by Lisa Torgersen. At one time, the primary asset of APFC was a fishing vessel, the *Atlantic Star*. Currently, its primary asset is the rights to this litigation. Plaintiff filed this action on March 9, 1999, alleging that Congress had effected a complete, temporary regulatory taking of the use of the *Atlantic Star* when it adopted legislation on three occasions, effectively idling the vessel for the period from November

1997 to July 6, 1999. Plaintiff's motion for summary judgment on liability was granted on April 4, 2001, in *American Pelagic I*, 49 Fed.Cl. 36. We applied a *Penn Central* test and held that the legislation took all valuable use of plaintiff's boat within the meaning of the Takings Clause. We determined that Congress' targeted and retroactive revocation of plaintiff's permits effected a loss, not simply of the permits, but of all use of plaintiff's vessel.

On January 28, 2002 defendant sought leave to file an amended answer and assert an affirmative defense and counterclaim based on fraud in connection with the flagging of the vessel. The court denied that motion in *American Pelagic Fishing Co., LP v. United States*, 52 Fed.Cl. 341 (2002) ("*American Pelagic II*"). We held that the government had no evidence that the *Atlantic Star* had been improperly flagged. Nor did defendant bring forward any evidence that Mrs. Torgersen had "knowingly or recklessly [made] false statements with intent to deceive." *Id.* at 343 (citing *Daff v. United States*, 31 Fed.Cl. 682, 688 (1994)). Further, defendant did not give an excuse for its delay in bringing this affirmative defense two months before trial. What remains is for the court to determine the nature and amount of plaintiff's damage, if any.

BACKGROUND

Before going into the particulars of the evidence, the court observes that it has rarely seen a greater contrast in the quality and competence of opposing sets of witnesses. Unlike defendant's witnesses, plaintiff's witnesses were uniformly straightforward, highly qualified, and, with the exception of the Torgersens, disinterested.

1. Beginning the Atlantic Star *Project*

Lisa Torgersen is the President and sole shareholder of APFC. She put herself through undergraduate and graduate school working in the Alaskan salmon industry. Mrs.

Torgersen worked as a crew member on salmon fishing boats during the summers from 1981 to 1989. Her specializations in school were international business and the Japanese language. After she received her masters degree in 1989, Mrs. Torgersen began to work full time for Birting Fisheries, Inc. ("BFI") in Seattle. For two years she continued as a crew member aboard salmon fishing vessels owned by BFI. In 1991, Mrs. Torgersen became the manager for a large factory trawler in Alaska, the *Ocean Rover*.[1] Mrs. Torgersen continued to work for BFI as its Operations Manager and later became the Operations/Sales Manager. BFI owned one large factory trawler and managed two others.

Later, Mrs. Torgersen went to New Zealand to manage two fishing vessels. During this time, Mrs. Torgersen married Harold Torgersen. Harold Torgersen is a Norwegian citizen whose family fished for herring, mackerel, capelin, and blue whiting. His father pioneered the herring and mackerel industry in Norway. Mr. Torgersen worked with his father's business every summer while growing up. In 1973, Mr. Torgersen began working on his father's fishing vessels full time. The vessels were purse seine combined trawlers.[2] In 1986, his family sold its vessels. In 1988, Mr.

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[1] A trawler is a vessel, like the *Atlantic Star*, which tows a net for harvesting fish. A factory trawler has the ability to clean, fillet, freeze and pack fish.

[2] A purse seine vessel uses a fishing seine net to surround the fish. The net hangs vertically, drawn down by weights on one side and held up by floats on the other. It is then pulled together around the fish. A trawl net, in contrast, is towed behind the boat for several hours in order to catch fish. A combination vessel has the capability to use each type of net.

Torgersen formed American Seafood, with two partners, for the purpose of exploiting the Alaskan fisheries. American Seafood purchased vessels in the United States and converted them into factory trawlers.

Although Mr. Torgersen had never been in Alaska, he was in charge of the technical aspects and design of vessels for American Seafood. Once converted into factory trawlers, American Seafood vessels became the highest producing vessels in Alaskan waters. In 1993, Mr. Torgersen sold his interest in American Seafood. He joined a research venture in Chile, fishing for blue whiting. After selling his stake in that venture, Mr. Torgersen managed eleven Russian vessels in Russian waters. He managed vessels of similar size and capacity to the *Atlantic Star*, staying out at sea for as long as six months. In short, Mr. Torgersen is one of the most successful commercial fishermen in the world. Mr. Torgersen eventually ended these activities to help his wife pursue the possibility of a vessel for the East Coast. In early 1996 BFI was sold. Mrs. Torgersen began to hear about the opportunities available on the East Coast of the United States. Mrs. Torgersen left BFI and began to investigate the possibility of a vessel of her own.

a. Herring and Mackerel in the Western Atlantic

The National Marine Fisheries Service ("NMFS") was in the midst of a campaign to encourage American fishing vessels to exploit the high levels of herring and mackerel stocks in the western Atlantic, as Mrs. Torgersen was researching the possibility of her own vessel. The agency considered these fish stocks to be seriously underutilized. NMFS's statements about underutilization of the pelagic

species[3] were discussed in our earlier opinion, *American Pelagic I*, 49 Fed.Cl. at 38. Additionally, the Mid-Atlantic Fishery Management Council published documents which outlined the need for vessels of greater size in order to participate in the world market for herring and mackerel. Plaintiff's witnesses confirmed that in 1997, the East Coast of America was the best, least exploited, fishing opportunity in the world.

NMFS sets quotas for the United States fisheries. The quotas have a direct relationship to the amount of fish available in United States waters. There was virtually no competition in the herring and mackerel industry off the East Coast. At the time Mrs. Torgersen was doing her research, only 15 to 20 percent of what was then the quotas for Atlantic herring and mackerel were being caught. The Rhode Island Seafood Council reported to NOAA in 1998 that there was no danger of overfishing mackerel in this area. In fact, the report noted that it was probable that the mortality rate of the Atlantic mackerel was greater than the catch each year.

In her research, Mrs. Torgersen became aware of these opportunities. She then began to research specifically the viability of entering the western Atlantic waters with a large fishing vessel outfitted for harvesting mackerel and herring. She relied on the International Trade Commission's ("ITC") study, "Mackerel: Competitiveness of the U.S. Industry in Domestic and Foreign Markets." The study confirmed that mackerel fisheries were underutilized in the United States. It

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[3] Pelagic fish are those fish whose habitat is above the floor of the ocean. Here, plaintiff was going to fish for two pelagic species, Atlantic herring, and Atlantic mackerel.

reasoned that due to a lack of economies of scale, the smaller American vessels fishing in the western Atlantic could not compete with the European vessels in terms of quality, transportation and marketing. The study concluded that larger fishing vessels would offer economies of scale and allow the United States Atlantic mackerel industry to compete internationally.

Capt. Michael Genovese testified for defendant. He captains a fishing vessel, the *White Dove Too*, in the western Atlantic. He took the view that the ITC studies were overly optimistic, based on his own difficulty locating mackerel. Capt. Genovese reasoned that mackerel were not present, because he often could not find fish. Additionally, he intimated that the government statistics were based on data which was inaccurately gathered. Neither he nor any other government witness furnished any details or explanation of these purported inaccuracies. The court gives little weight to his suspicions. He displayed a firm conviction that it would be impossible to fish in any manner better than the traditional one already employed off of the East Coast. Yet, Capt. Genovese showed a complete lack of knowledge about vessels of the same size and capacity as the *Atlantic Star*. He made no attempt to conceal his personal opposition to new vessels coming into East Coast waters. We accept the accuracy of the NMFS and ITC data.

Harold Torgersen acknowledged that some of those fishing on the East Coast may not have been able to find herring and mackerel readily. He attributed these difficulties to problems other than the lack of fish, however. He explained that herring are usually widely distributed and can be difficult to find. Advanced methods of targeting and capturing the fish would eliminate most difficulties. Mr. Torgersen also explained that mackerel swim much faster than the cod or haddock normally caught along the East Coast. The *Atlantic Star* was to be outfitted with the best

sonar and finding equipment available.[4] Such a vessel, with substantially more horsepower than those vessels already operating off the East Coast, would be necessary to catch enough Atlantic herring and mackerel to compete with the European industry.

Mr. Torgersen also explained that in order to be profitable in the herring and mackerel industry, a vessel would need to be capable of staying out at sea for long periods of time. This would enable the vessel to stay with the fish as they moved, eliminating the need to continually relocate the schools of fish. He noted, however, that it was common practice for the smaller East Coast vessels to return to shore as soon as their relatively small storage tanks became full. This disruption made the fish more difficult to relocate. The court finds the explanations given by plaintiff's witnesses to be more plausible than Capt. Genovese's unsupported assertions. We conclude that there were ample stocks of mackerel and herring in the western Atlantic. As explained more fully below, the *Atlantic Star* was uniquely well suited to find and catch them.

b. Financing and Marketing

After examining the ITC studies, Mrs. Torgersen investigated whether there would be a market into which she could sell East Coast mackerel and herring. While employed at BFI, she had established a thriving niche market for atka mackerel in Japan. Capitalizing on her strong ties to the Japanese buyers, Mrs. Torgersen sent samples of mackerel to

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[4] The *Atlantic Star* was equipped with sonar that could find herring within 4,000 meters and mackerel within 2,000 meters.

three Japanese companies with whom she had done business previously. Each sent back an enthusiastic letter expressing their desire to purchase large quantities of Atlantic herring and mackerel. Mrs. Torgersen was also confident, based on her previous experience selling pollack with roe that she could cultivate a market for herring with roe among Japanese buyers. The court is persuaded that Mrs. Torgersen could have developed a market for herring, herring with roe and mackerel from the western Atlantic in Japan, as well as other markets.

Mrs. Torgersen then sought financing for a vessel to fish in the western Atlantic. Bryggens, an investment brokerage company, aided Mrs. Torgersen in her search. Initially, a plan was drawn up for the *Atlantic Star* to be a mother ship.[5] However, plaintiff was unable to obtain financing for the vessel on that basis. Investors did not think that the project would offer sufficient economies of scale to make the venture profitable. APFC changed its plans and began to seek financing for a vessel which would both catch and freeze its own fish in the western Atlantic.[6] APFC attempted to find financing for the vessel as a freezer trawler without updating the "mother ship" business plan provided by Bryggens.

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[5] A mother ship is a processing ship which does not catch its own fish. Instead, smaller vessels actually catch fish, which are then pumped onto the processing vessel. Once the mother ship processes the fish they are shipped to the final destination.

[6] This type of vessel is known as a freezer trawler. A freezer trawler has the capacity to catch all its own fish. The fish are then frozen, or processed, on board the vessel. After the fish are processed, they are offloaded to be shipped to their final destination.

Mrs. Torgersen was president and sole shareholder of Atlantic Star Fishing Company ("ASFC"). ASFC was formed in November of 1996 for ease of financing the purchase of a vessel designed solely for the Atlantic fishery. Mrs. Torgersen was also the president, secretary and majority shareholder of Pelagic Management Inc. ("PMI"), which was formed to manage the vessel ASFC purchased. Initially, ASFC and PMI joined as partners in APFC, with PMI as the general partner and ASFC as a limited partner. ASFC and PMI were then joined in APFC by Dutch partners, American Pelagic Combination, V.O.F., as APFC sought additional financing for its venture. American Pelagic Combination, V.O.F., owned by Parlevliet and Van der Plas, gained a 49% interest in APFC.[7] APFC eventually obtained financing from ING Bank in The Netherlands to purchase an existing vessel and convert it into a high volume mackerel and herring trawler.[8] APFC was the corporate entity which purchased the *Atlantic Star*.

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[7] American Pelagic Combination, V.O.F. would later withdraw from APFC when the Atlantic Star was sold to Parlevliet and Van der Plas.

[8] As a condition to gain financing, plaintiff obtained a $23 million political risk insurance policy from Lloyd's of London. The premium for the insurance policy was $290,000. Mrs. Torgersen testified that plaintiff did not receive any proceeds from this policy. The policy provided coverage, in part, "in the event that 'any of the permissions are revoked, cancelled or not renewed * * *' Directly as a result of: (i) a Change in Law (as defined herein) and/or (ii) any change to the Open Access Policy relating to the Herring and/or Mackerel Fisheries in the North East Region * * *." Instead, lenders with mortgages on the Atlantic Star received a payment from Lloyd's of London in a settlement.

2. Facilities of the Atlantic Star

Upon securing financing for the venture, plaintiff sought a United States hull for purchase. Procuring an existing United States hull was necessary in order to receive the appropriate U.S. flag, as well as any U.S. fishing licenses. Plaintiff purchased a vessel, which was then named *Apollo II*, for $1.7 million. At the time of purchase, the *Apollo II* was outfitted as an incinerator ship. APFC determined that the vessel was large enough to convert to a freezer trawler. Plaintiff concluded that the cheapest and fastest way to outfit the vessel for pelagic fishing in the western Atlantic was to have it towed to Norway and overhauled.

a. Outfitting the *Atlantic Star*

Mrs. Torgersen ensured that there was enough capacity to achieve profitable economies of scale when choosing fishing and freezing equipment. Additionally, APFC took great care to outfit the *Atlantic Star* with the best, most appropriate equipment for the East Coast herring and mackerel fisheries. The vessel was designed and outfitted as a high volume herring and mackerel trawler.

Capt. Robert Hempstead testified for plaintiff. Capt. Hempstead was the former captain of the *Atlantic Star* during the time that it fished in Mauritanian waters. Capt. Hempstead has been employed in the maritime industry since 1973, serving as captain, first mate and first officer on a variety of vessels. Capt. Hempstead showed comprehensive knowledge of vessels of the same size and capacity as the *Atlantic Star*, as well as the fishing industry in general. In particular he had a detailed understanding of the outfitting of the *Atlantic Star*. The court found Capt. Hempstead to be a highly reliable witness. He explained that the vessel was "purpose-built" for the East Coast fishery.

The *Atlantic Star* was outfitted with a single, large net, approximately 369 feet in length. It was attached to the boat

by lines about 1000 meters long. The net was held open by two large steel doors attached to the back of the *Atlantic Star*, known as trawl doors. It could safely hold 400 to 500 metric tons of fish in what is known as the "codend." Capt. Hempstead testified that the boat could, in one five hour tow, catch at least 300 tons of fish. If it had been allowed to fish in United States waters, APFC would have outfitted the *Atlantic Star*'s net with a sorting grid. The grid would have allowed smaller fish to escape, enabling the *Atlantic Star* to consistently catch a larger size of herring and mackerel.

The *Atlantic Star* had two engines with a total of more than 13,000 horsepower, far in excess of other pelagic trawlers on the East Coast. Almost 7,000 of this horsepower ran the generators for the freezing plant. The remaining horsepower was used to propel the ship. Plaintiff's witnesses testified that horsepower is extremely important when considering how much fish a particular vessel could catch, in part because the net of a vessel is designed around its horsepower. Capt. Hempstead explained that a vessel with more horsepower could tow a bigger net with bigger trawl doors at a higher rate of speed. High speed is important when catching mackerel, because the vessel must be able to keep up with the fish. A larger net and greater speed would, therefore, lead to more fish caught.

Mr. Arne Uhlen, plaintiff's expert on processing plants, testified that the *Atlantic Star* was outfitted with the best freezing equipment available, possibly better than any other ship at that time. He oversaw the operation of the *Atlantic Star*'s processing plant during the time it fished in Mauritania. Mr. Uhlen has worked in the fish processing industry since the late 1970s, and displayed extensive knowledge about the industry. The court finds his testimony highly credible. He took pains to make his testimony accurate. Mr. Uhlen knowledge on the subject of processing

was obviously based on extensive technical understanding, as well as personal experience.

Mr. Uhlen described the processing plan of the *Atlantic Star* as follows. Once caught, the fish were pumped on board, as opposed to hoisted onto the deck still in the net.[9] The *Atlantic Star* could pump 300 tons of fish into the hull in a matter of minutes. As the fish were pumped aboard they were sent through a dewatering tank. The fish were then pumped into the refrigerated seawater tanks ("RSW tanks"). The vessel was outfitted with six RSW tanks. Each tank could hold up to 150 metric tons of fish. As with the fishing equipment, plaintiff incurred extra expense to purchase the maximum freezing capacity for the *Atlantic Star*. Once in the RSW tanks, chilled sea water was used to cool the fish. After they were cooled, the fish were pumped through a sorting machine.

The sorting machine, consisting of a system of rollers, would separate the fish into different sizes and send them into bins filled with chilled water.[10] After the fish were sorted according to size, they were pumped through a tube and into plate freezers. Once inside the freezers, the fish were frozen into solid blocks. The frozen blocks then

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[9] Pumping on board was safer, as the stability of the vessel was not jeopardized by a large net of fish coming on board. Additionally, the fish would remain alive longer while in the codend, instead of being crushed by other fish if brought on deck in the net.

[10] Although the vessel ultimately never fished for herring, the court found the testimony of Ms. Torgersen, Mr. Torgersen and Mr. Uhlen highly credible that the sorting machines were sophisticated enough to sort herring with roe from herring without roe.

traveled along a conveyor belt to machines which placed the blocks in cartons and strapped the cartons shut. Workers would then stack the cartons on wooden pallets.

The plan put forward by plaintiff is not a mere speculation. As explained *infra*, although the vessel was barred from United States waters, efforts were made to fish elsewhere. The *Atlantic Star* fished in Mauritania, the only fishery available without causing the loss of its status as an American-flagged vessel. Mrs. Torgersen put the mechanics of this plan for the ship fully into operation when it was in Mauritania.[11]

b. Plans to Offload at Sea

APFC intended to offload 90% of its frozen fish at sea. This approach was more profitable than going to shore to offload because the vessel would be able to stay at sea, eliminating transit and searching time. The ship was outfitted with everything necessary to remain at sea for months at a time. The *Atlantic Star* had two custom-made cranes. They were designed to lift eight tons and intended to aid the vessel in offloading in whatever weather conditions the vessel might face. The ship carried sufficient fuel, food and parts for an extended trip, and could have been re-equipped by other ships. Further, Capt. Hempstead testified that weather would not play a significant role in the ability of the *Atlantic Star* to fish or remain at sea.[12] The Atlantic Star

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[11] Plaintiff provided the court with a DVD containing a tour of the vessel as it operated in Mauritania.

[12] In fact, Hempstead testified that in the Baltic Sea, a trip discussed *infra*, where the weather conditions are notoriously bad, the *Atlantic Star* was only kept from fishing approximately half a dozen days.

demonstrated its capacity to off-load at sea during its tour in Mauritanian waters.

We give little credence to the contrary testimony of Michael Love. Mr. Love was a former employee of APFC. He was hired to aid in the effort to lobby Congress to allow the *Atlantic Star* to retain its fishing permits. He later served on the crew of the *Atlantic Star* in Mauritania. Mr. Love returned home to the East Coast after the first fishing trip and was not recalled to the *Atlantic Star*. Mr. Love's courtroom demeanor made his unfavorable views of plaintiff clear.[13] Furthermore, it was apparent to the court that Mr. Love had no knowledge of plaintiff's initial business plans, prior to meetings with Congress. Mr. Love testified that he was not present for the initial discussions regarding financing or choice of equipment. Thus, any knowledge about whether plaintiff intended to off load at sea came only after plaintiff was making concessions in an effort to appease members of Congress. The court finds his testimony unreliable. We therefore find that plaintiff intended to offload 90% of its cargo to tramper vessels at sea.[14]

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[13] Defendant attempted to show that Mr. Love was a part owner in the *Atlantic Star*, in order to show that he was qualified to testify regarding the value of the business. However, Mr. Love held, at most, a de minimus interest, for which he never paid. The court, therefore, does not rely on Mr. Love's testimony with respect to APFC's value.

[14] A tramper vessel is a commercial fishing vessel which transports cargo whenever it is hired to do so.

3. Atlantic Star *Precluded from Fishing in United States Waters*

While the *Atlantic Star* was being overhauled in Norway, at a cost of approximately $34 million, plaintiff applied for and obtained all necessary fishing permits.[15] The permits were reissued to the vessel on April 8, 1997 and April 12, 1997. In November 1997, as the *Atlantic Star* was poised to begin fishing, its permits were retroactively voided. At the same time, APFC was prospectively barred from obtaining new permits.[16] The details of the permitting process and

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[15] In order to fish for, possess, or land Atlantic mackerel in the Exclusive Economic Zone of the United States, plaintiff was required to apply for a permit under 50 C.F.R. § 648.4(a)(5). Because incidental by-catch of nonregulated species was possible, plaintiff applied for a Northeast Multispecies (Nonregulated) permit under 50 C.F.R. § 648.4(e)(1). Plaintiff requested an authorization letter from the Regional Administrator in the Gulf of Maine/Georges Bank Regulated Area for plaintiff's net, because the mesh size necessary for herring and mackerel was smaller than normally required by 50 C.F.R. § 648.80(d). The Northeast Regional Office of NMFS issued the following permits on February 5, 1997:

1. Federal Fisheries Permit # 610018, for Atlantic mackerel and *Illex* squid and for incidental *Loligo* squid and butterfish, with an expiration date of December 31, 1997.

2. Federal Fisheries Permit # 610018, for Northeast Multispecies (Nonregulated), with an expiration date of April 30, 1998.

[16] Congress adopted section 616 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998, Pub.L. 105-119, 111 Stat 2440 (1997) ("1997 Appropriations Act"), which had the initial effect of revoking plaintiff's permits and barring their reissuance for one year. An identical provision was enacted on October 21, 1998 as section 617 of the Department of Commerce, (cont'd)

subsequent loss of the permits are discussed in greater depth in American Pelagic I, 49 Fed.Cl. at 40.

4. Trips Made by the Atlantic Star

a. Baltic Sea trip

Mrs. Torgersen testified that she tried to put the vessel to some use during what she hoped would be a temporary moratorium after passage of the 1997 Appropriations Act. She took the *Atlantic Star* to the Baltic Sea to participate in a research project. The *Atlantic Star* did none of its own fishing, but operated as a mother ship, processing fish from catching vessels. The vessel only remained in the Baltic Sea for a few months, because the venture was not profitable.

b. Mauritania trip.

Plaintiff was able to utilize the *Atlantic Star* as a fishing and processing vessel for the first time off the coast of Mauritania, in west Africa. Mauritania does not have a fishing fleet of its own and it imposes no restrictions on foreign flagged vessels. Instead, vessels must simply purchase fishing permits. The *Atlantic Star* thus was able to purchase fishing rights while maintaining its status as a United States flagged vessel.

Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1999, Pub.L. 105-277, 112 Stat. 2681 (1998) ("1998 Appropriations Act"). Plaintiff was permanently barred from obtaining herring and mackerel permits by § 3025 of the 1999 Emergency Supplemental Appropriations Act, Pub.L. 106-31, 113 Stat. 57 ("1999 Appropriations Act").

The equipment aboard the *Atlantic Star* performed exactly as expected in Mauritania.[17] The best day of processing for the *Atlantic Star* was 14,872 blocks or approximately 342 metric tons in one day.[18] Within one month, the ship was performing better than any other ship in Mauritania. However, the lack of consistent quantities of fish precluded the vessel from processing at its full capacity. Thus, the *Atlantic Star* was unable to produce to its highest level of 340 metric tons per day, nor at the rate of 250 metric tons plaintiff proposes here, on a regular basis.

Not only was the *Atlantic Star* plagued by a lack of fish, Mauritanian waters posed unique problems for processing. The temperature both of the sea water and the fish in Mauritania was significantly warmer than it would have been in the western Atlantic. It took longer to chill the fish in the RSW tanks, and longer to freeze them in plate freezers. Mr. Uhlen testified that, in contrast, the water temperature on the East Coast of the United States would have been perfect

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[17] Arnie Uhlen did discuss some minor problems with a strapping machine, which was used to close the cartons containing frozen blocks of fish. He acknowledged that for a time only two machines worked. However, the machines were promptly fixed.

[18] The figure 342 metric tons represents 14,872 blocks, multiplied by 23 kilograms. Plaintiff explained that while in Mauritania it packaged up to 23 or 24 kilograms of fish into each carton. These cartons would normally hold 20 kilograms. Plaintiff explained that the fish from Mauritania are often bound to west African markets where weight scales are not available. Therefore, the cartons are packed full so that the buyer knows that it has not been cheated. Plaintiff explained that full packing was possible because there was no reporting regime in Mauritania, which would have required accounting for the extra kilograms of fish.

for the processing system of the *Atlantic Star*, especially in wintertime. Although the conditions were not ideal in Mauritania, Capt. Hempstead testified that the experience in Mauritania showed that the *Atlantic Star* could have operated extremely well in the western Atlantic.

Plaintiff lost money during its time in Mauritania despite the fact that it outfished every other vessel. Mauritanian waters simply did not offer enough fish for a long enough period of time to allow the *Atlantic Star* to be profitable. Other boats were able to supplement their catch by fishing during prime season in Mauritania, but then spending the rest of the year in European waters. The *Atlantic Star* was prohibited from doing the same because it could not fish in European waters. By April 1999, APFC was operating at a loss, and behind on payments. Suppliers were considering arresting the vessel due to the nonpayment of invoices. Attempts to secure additional financing by APFC were unsuccessful. After considering and rejecting Chapter 11 bankruptcy, the partners of APFC, Parlevliet and Van der Plas, agreed to take over both the payment of bills and the revenue of the *Atlantic Star*. Parlevliet and Van der Plas eventually purchased the *Atlantic Star* from APFC on July 6, 1999.[19] From April until July, APFC continued to pay corporate expenses, but Parlevliet and Van der Plas assumed the revenues and expenses for the vessel.

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[19] Plaintiff recorded a gain on the sale of the vessel. Ms. Wendy Visconty, plaintiff's accounting expert, explained that this gain resulted from the difference between removing the vessel from the books and the liabilities associated with the vessel from the books. The gain was not, according to Ms. Visconty, a cash gain to plaintiff.

5. Other Profitable Options not Open to Plaintiff

a. Alternative Fishing Options

Defendant intimates that plaintiff could have fished for herring alone, since permits were not required for herring in the western Atlantic. Mrs. Torgersen testified that mackerel is an inevitable by-catch when fishing for herring.[20] Defendant concedes that a permit is required just to possess mackerel. The 1997 Appropriations Act and 1998 Appropriations Act precluded the *Atlantic Star* from holding the necessary permit. Therefore, we conclude that the *Atlantic Star* could not fish for herring alone, because of the inevitable by-catch of mackerel.

In addition, plaintiff could not take the vessel to any other United States fisheries. The other fisheries within the United States Exclusive Economic Zone ("EEZ") have their own permitting regime, none of which would have been open to the *Atlantic Star*. Under the 1997 Appropriations Act and the 1998 Appropriations Act, no permits of any kind could be issued to plaintiff.[21] The 1999 Appropriations Act only

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[20] Capt. Genovese also testified for defendant that herring and mackerel swim together, and are inevitably by-catch of one another.

[21] The 1997 Appropriations Act § 616(a)(2) stated that none of the funds appropriated in the bill may be made available to issue or renew a fishing permit or authorization "that would allow such a vessel to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United States." A vessel could have a permit if it had documentation or endorsements prior to September 1997 and were not surrendered at any time afterwards. However, § 616(c) declared all of APFC's permits to be null and void. Therefore, after the passage of the 1997 Appropriations Act, plaintiff was barred from fishing (cont'd)

restricted the availability of APFC to obtain herring[22] and mackerel permits. Even so, Mrs. Torgersen testified that there was no other fishery large enough in the United States EEZ in which plaintiff could obtain a permit which could have allowed the *Atlantic Star* to make a profit. For instance, the Alaskan fishery was already regulated under a limited access plan. This meant that the fishery was already fully capitalized and open only to those vessels with a prior catch history.[23]

Mrs. Torgersen testified that the only fishery outside of the United States in which the *Atlantic Star* could obtain fishing rights was Mauritania. In order to fish in the EEZ of any other country, re-flagging the vessel would have been necessary. As discussed above, the *Atlantic Star* lost money fishing in Mauritania.

b. Mother Ship Option

Another suggested use of the *Atlantic Star* was as a mother ship. There were several factors which precluded utilizing the vessel in this manner, however. First, APFC could not obtain financing for a venture in which the *Atlantic Star* was simply a mother ship. Because of the *Atlantic Star*'s design and equipment, it probably would have lost

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anywhere a permit was required within the United States EEZ. The language of the 1998 Appropriations Act was identical.

[22] Although not specifically required for the western Atlantic fishery.

[23] A prior catch history, according to Mrs. Torgersen's testimony, is the catch which a particular vessel was able to land in previous years.

money as a mother ship.[24] Second, the vessel could not possess any mackerel without a permit, even as a mother ship.

In sum, Mrs. Torgersen conducted an exhaustive, although ultimately unsuccessful, search for a fishery in which the *Atlantic Star* could be operated profitably and in which it was eligible to obtain all the necessary permits. Defendant offered no evidence to the contrary.

6. Plaintiff's Theory of Recovery

APFC's compensation model is based on the fair rental value of the *Atlantic Star*. Unfortunately, there was no existing market for leasing a vessel like the *Atlantic Star* fishing off the East Coast. The *Atlantic Star* was unique. Contrary to defendant's suggestion, however, this does not preclude a request for compensation. We agree with Dr. James Miller, plaintiff's expert, that an appropriate model for fixing fair rental value can be derived from the reasonably established net revenue stream.

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[24] Capt. Hempstead explained that the *Atlantic Star* had been outfitted to fish and process. This investment was useless when the *Atlantic Star* was used as a mother ship. Plaintiff could not have operated profitably unless it utilized the whole of its capacity. Mr. Uhlen's testimony to the contrary is not persuasive. He acknowledged that he was not sure that such an option was actually profitable. His expertise related to the processing capabilities of the vessel, not its financial management. Mr. Love offered an opinion about the ability of the *Atlantic Star* to operate as a mother ship based on the assumption that the *Apollo II* hull had been outfitted from the outset as a mother ship—a completely separate question.

Dr. Miller is the chairman of an international economic, financial and regulatory consulting firm. He is the former Director of the Office of Management and Budget, former Chairman of the Federal Trade Commission, and has served in several other government capacities. Dr. Miller received a Ph.D. in economics from the University of Virginia. He has taught economics at University of Virginia, George Washington University and George Mason University. His testimony was clear, thorough and showed an understanding of the realities facing the *Atlantic Star*. The court found him to be a highly competent, reliable witness.

Dr. Miller utilized the net revenue stream which would have been available to the *Atlantic Star* in order to determine what the rental value of the vessel would have been in a fair market. He explained that, as with any lease, the total income stream available to the lessee and lessor is a fixed amount. Therefore, whether the lessee were to take on all costs and revenues and pay a fixed amount to lessor, or lessor were to assume some costs for a portion of the revenues, the net effect would be the same. In a competitive market, the difference between the amount that the lessor could have made operating the vessel itself or renting to the lessee will be razor thin. The net revenue stream is an appropriate measure, therefore, for rental value. It represents what the lessee would be willing to pay and what the lessor willing to accept as reasonable rental value. Furthermore, Dr. Miller testified that the conservative nature of the projections he used for plaintiff's revenues, combined with a generous allowance for costs, would leave ample room for a potential lessee to make a significant profit. The business opportunity would have been very attractive to a potential lessee.

After determining the appropriate monthly rental fee, based on the *Atlantic Star*'s revenue stream, Dr. Miller adjusted the monthly fees back to the beginning of the damages period. In order to bring each month's rent back to

the first month of the taking, Dr. Miller applied the weighted average cost of capital ("WACC"). He explained that each corporation's WACC is based on its cost of debt and equity and the corporation's mix of each. The cost of debt is determined by the cost of third-party loans held by that entity. The cost of equity is determined by the return on equity earned by other fishing firms during the same period. Taken in their relative proportion in APFC's financing structure establishes APFC's WACC of 18.5%. When he brought the operating margin back to December 1997, the first month of the taking, the rental value for the *Atlantic Star* was $44,742,926. Dr. Miller based his calculations on a 75,000 metric ton per year model. The net revenue from the sale of herring and mackerel would have been $72,577,500. The total costs, based on a 75,000 metric ton model were estimated at $27,834,574.

Once plaintiff's revenue stream for the rental of the *Atlantic Star* was brought back to the date of the taking, Dr. Miller applied a rate for a safe investment, the five year treasury rate, to bring plaintiff's damages to current dollars. The current value of the rental value of the *Atlantic Star* at the time of trial was $55,913,929. The reasonableness of plaintiff's damages model will be discussed *infra*. However, the court first addresses disputes with respect to the figures for revenues and costs imbedded within the calculation.

a. Price of Herring and Mackerel

Plaintiff's expert, Mr. David Ellenton, provided the court with an analysis for the appropriate sales price for herring and mackerel. He has a wealth of knowledge about the world export market for herring and mackerel based on experience marketing large volumes of fish. Mr. Ellenton was a very convincing witness.

Mr. Ellenton determined that American export prices were not the appropriate measure, because they were too

high. The overall American market for Atlantic herring and mackerel is very small. The majority of Atlantic herring and mackerel caught in America goes into the domestic bait market, a small niche market which artificially inflates the average price of Atlantic herring and mackerel. American producers do not sell in volume into the larger international markets, and their prices thus do not provide a good benchmark for the volume of fish APFC would produce. Therefore, he examined the Dutch and Norwegian export prices for herring and mackerel.[25] Norway and Holland are the world's largest producers. According to Mr. Ellenton, due to the volume of fish the *Atlantic Star* would have marketed, Dutch and Norwegian prices are the appropriate starting point.

Mr. Ellenton established an average Dutch and Norwegian price for each month during the damages period based on information provided by the Norwegian Seafood Export Council and the Netherlands Central Bureau of Statistics. The raw data provided by these agencies listed the price for herring or mackerel sold into a particular country by month. Mr. Ellenton established an average monthly price based on the prices for those markets into which he anticipated APFC would sell. He made no decisions about how much of plaintiff's anticipated 75,000 metric tons of fish would be sold into each particular country. Instead, he included in his average price all of those markets into which

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[25] During trial defendant objected to Mr. Ellenton's testimony as it related to world export prices. During discovery the parties had agreed to rely upon United States export prices for Atlantic herring and mackerel. However, the government's own witness based his opinion on the same world export prices. This made irrelevant the attorneys' prior agreement.

he anticipated APFC would sell. He then adjusted that price based on the average exchange rate from Dutch and Norwegian currency.

Mr. Ellenton explained that the *Atlantic Star* may not have been able to sell fish at the Dutch and Norwegian prices. As a new vessel in the market, the *Atlantic Star* would have a market entrance barrier to overcome. Additionally, the fat content in the fish supplied in the United States might be lower than that supplied by Dutch and Norwegian vessels. This could have affected price, because some purchasers prefer fish with higher fat content. These differences led Mr. Ellenton to make a reduction of 10% to both the Dutch and Norwegian export prices. He then averaged the two, concluding that APFC would have received $ 0.41 per kilogram for Atlantic herring and $ 0.73 per kilogram for Atlantic mackerel. The prices which Mr. Ellenton provided were free on board ("F.O.B.").[26]

The government's expert on this issue, Mr. Jeffery Reichle, did not dispute the basic premise of Mr. Ellenton's analysis-that American export prices were not an accurate model for prices the *Atlantic Star* would have received. Beyond that point, however, he and Mr. Ellenton parted ways. Mr. Reichle did not pretend to be a disinterested witness. He was heavily involved in the lobbying effort to keep the *Atlantic Star* from fishing off the East Coast. Furthermore, Parlevliet and Van der Plas, the partners of ASFC in APFC, had offered to buy Mr. Reichle's business, Lund's Fisheries. In his view, the offered purchase was an

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[26] A F.O.B. price assumes that the fish are sold direct from the vessel. The price does not incorporate a cost for shipping.

effort to remove him as an opponent to the *Atlantic Star*. Furthermore, his testimony reflected inattention to detail and a lack of knowledge about Mr. Ellenton's method. Nor was he experienced in the volumes of fish APFC would have sold. For these reasons, the court gives little weight to his testimony.

Mr. Reichle opined that only Dutch prices for herring and mackerel were appropriate measures. He thus excluded Norwegian export prices. Mr. Reichle reasoned that almost all Norwegian product went to Japan because Norwegian fish were caught by purse seine nets and frozen by blast freezers, making them more desirable. However, Mr. Reichle testified that he did not know whether Mr. Ellenton had made any adjustments based on where APFC would market its fish and he was unaware which markets Mr. Ellenton included in his average Norwegian price. Additionally, Mr. Ellenton's report provides sufficient evidence that the Norwegian product was not, in fact, sold primarily to the Japanese market. The court rejects Mr. Reichle's reliance on Dutch prices alone.

Mr. Reichle made certain price reductions to Mr. Ellenton's model. Mr. Reichle opined that the fat content of Atlantic herring and mackerel in the western Atlantic tends to be lower than that in Dutch waters. Additionally, he testified that those fish caught in the western Atlantic tended to be smaller than those in the Dutch waters. He reasoned that a 10% quality adjustment from the Dutch price for mackerel and 15% for herring was appropriate. Mr. Reichle stated that a differentiation between APFC prices and the Dutch prices was necessary because the Dutch fleet was made up of primarily purse seines. According to him, purse seines would produce a higher quality of fish because they would not damage the fish in the same way that a trawl vessel would. Finally, Mr. Reichle explained that the vertical plate freezers which APFC intended to use would produce a lower quality

of frozen fish than usually provided by Dutch vessels, which used blast freezers.

Mr. Reichle provided no information as to why a greater adjustment was necessary for herring as opposed to mackerel. Further, he did not explain why the quality adjustments Mr. Ellenton made were not sufficient. Mr. Ellenton testified that his 10% price reduction took into account the difference in fat content between the American and European producers. Mr. Torgersen testified that during the damages period the Dutch fleet did not, in fact, contain *any* purse seines. In addition, both Mr. Torgersen and Mr. Ellenton explained that the majority of Atlantic herring and mackerel are frozen in the same manner as the *Atlantic Star*. In fact, Mr. Ellenton testified that there was almost no gap in the quality between American and European product. It would be even less significant for the *Atlantic Star*, which would be able to catch larger fish and process them without damage. The court rejects Mr. Reichle's quality adjustments.

Mr. Reichle also made a reduction in price for the increased distance between the vessel and its final market for APFC, in comparison to Dutch producers. Mr. Reichle reasoned that a $0.035 per kilogram reduction from plaintiff's prices would be appropriate for the difference in freight costs. He opined that because the *Atlantic Star* would be off the East Coast of the United States it would have to pay more for transport to final markets.

There are several problems with Mr. Reichle's adjustment. First, he relied on Mr. Ellenton's prices for his analysis, which were F.O.B. Therefore, as pointed out in the supplemental report of plaintiff's accounting witness, Ms. Visconty, freight is most appropriately an additional cost, not an adjustment to price. Nor did Mr. Reichle provide a basis for the amount of his adjustment. He exhibited a lack of knowledge regarding shipping cost for the volume of fish

which APFC proposed. This lack of knowledge was compounded by the fact that he calculated an adjustment for freight not knowing into which countries Mr. Ellenton's price reflected sales. For these reasons, the court makes no adjustment to plaintiff's price for transportation costs.

Finally, the court rejects Mr. Reichle's adjustment based on his understanding that Dutch producers routinely package 23 kilograms into 20 kilogram cartons. As explained by Mr. Torgersen, the Dutch regulatory system requires that every kilogram of fish which is caught, as well as every kilogram of fish produced, be reported. The Dutch prices reflected in Mr. Ellenton's reports are reported by the kilogram, and not by the carton. Therefore, whether a carton could hold 20 or 23 kilograms would be immaterial for purposes of determining price, since the prices are reported per kilogram. Furthermore, plaintiff's witnesses, whom the court finds to be more reliable, all testified that the there is no over-packing done by Dutch producers. Instead, if a market, as in Mauritania, requires that a carton is packed full, both the buyer and seller understand that the price negotiated is per kilo, no matter how full any particular carton may be. Therefore, the court will not adjust plaintiff's prices for a difference in Dutch packaging methods.

b. Price of Herring with Roe

Mr. Ellenton determined that the most appropriate price for herring with roe was $1.38 per kilogram. Unlike prices for Atlantic herring and mackerel, Mr. Ellenton determined that the United States export price was, in fact, the most accurate measure. He reasoned that the price of herring with roe sold to Japan and China today from the United States is the most analogous to the product that APFC would have sold. Currently, the United States exports herring with roe caught off the West Coast. Mr. Ellenton confirmed Mrs. Torgersen's view that the *Atlantic Star* would have caught

enough herring with roe to create a market at $1.38 per kilogram. He acknowledged that there are routine closures, disallowing fishing during specific time periods along the Gulf of Maine during the herring spawning season. However, Mr. Ellenton explained that there are no closures on George's Bank, in northern Maine. He testified that the *Atlantic Star* could have harvested enough herring with roe there to provide a sufficient supply to maintain the $1.38 per kilogram price.

In contrast, Mr. Reichle concluded in his expert report that APFC had not intended to market herring with roe. In addition, Mr. Reichle testified that he had no experience marketing that product. Nor was he aware of Mrs. Torgersen's ties to the Japanese market. He based this on the deposition of Mrs. Torgersen, in which, when asked if there were any mention of Atlantic herring with roe in the 1998 budget, she responded that there was not. She went on, however, to explain that the 1998 budget was a "preliminary, probably working document and it was just to get an idea of the overall, just the big picture." Furthermore, this preliminary budget was prepared during negotiations with Congress. Mr. Reichle conceded that the budget to which Mrs. Torgersen referred in her deposition had little bearing on her plans to market herring with roe. It was also apparent from Mrs. Torgersen's testimony, as well as her business plans that APFC did, in fact, intend to market herring with roe. The court finds that there is no basis to reject Mr. Ellenton's price for herring with roe.

c. Costs

The second element of plaintiff's damage calculation is the offsetting cost of operation. Ms. Wendy Visconty, a managing director of RSM McGladrey, Inc., testified for the plaintiff. She was qualified as an expert in auditing as well as accounting, particularly for businesses of the size and type

of APFC. She had experience with auditing Alaskan fishing vessels. Ms. Visconty provided the court with an extensive and detailed analysis of the *Atlantic Star*'s costs. Her report was well documented and thoroughly researched. Unlike defendant's accounting expert, Mr. Paul Berdy, Ms. Visconty did not have any personal connection to the case.

She included three categories of costs: materials, labor, and manufacturing overhead. Within materials she included costs necessary to package the *Atlantic Star*'s catch, as well as those expenses related to offloading and storage. The cost of packaging material, including the cartons and their plastic liners, was independently verified by a quote obtained from a supplier at $3,752,000. Ms. Visconty included docking, cold storage, and pallet replacement within her calculations for off-loading at $636,000. These costs were approximated from available prices from actual suppliers.

Labor costs of $12,584,135 included crew salaries and share, payroll taxes, technician fees, crew travel, and galley supplies. For crew salary and share,[27] technician fees, as well as the computation payroll taxes, Ms. Visconty assumed that for highly skilled workers, the *Atlantic Star* would be competing with similarly outfitted vessels in the Alaskan fisheries. She explained that in this industry it is common for highly skilled crew to be flown long distances in order to outfit vessels. Ms. Visconty therefore based her opinion on salaries, technician fees, and crew share information for the *Atlantic Star*'s crew in Mauritania, but also for similar

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[27] Ms. Visconty testified that the cost for crew share would vary according to the amount of the *Atlantic Star*'s production, because crew share is calculated on a percentage of production sold.

vessels in Alaska. This resulted in higher overall costs. She then included a modest increase to these costs in order to make the estimates very conservative, i.e., higher. She based her estimates for crew travel and galley supplies on the *Atlantic Star*'s actual experience in Mauritania, once again including an adjustment to ensure the estimates were conservative.

Finally, Ms. Visconty estimated costs for manufacturing overhead. She included $10,862,439 in costs for spare parts, repairs and maintenance, fuel, insurance, brokerage fees, administration[28] and other miscellaneous expenses. Once again, Ms. Visconty relied on both independent research and the *Atlantic Star*'s experience in Mauritania. As with the earlier expenses, she included an adjustment in order to ensure her numbers were not only accurate, but conservative. Therefore, although the *Atlantic Star* only incurred, on average, $52,000 per month in spare parts costs, Ms. Visconty's report includes costs of $100,000 per month in costs. The increase allowed for the replacement of a net, as well as the wear which could occur because of aggressive fishing on the East Coast. The same type of analysis was done for repairs and maintenance. Fuel costs were estimated based on the fuel usage of similar sized engines. Insurance, brokerage and other miscellaneous fees were calculated by comparison to vessels of similar size.

Mr. Berdy testified for defendant. He did not dispute Ms. Visconty's basic analysis. He contended that there were

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[28] Brokerage fees and administration costs, according to Ms. Visconty would have a direct relationship with production by the *Atlantic Star*.

costs missing from her report. He explained in his report that an *ad valorem* customs fee, political risk insurance, and drydocking costs should all be included within *Atlantic Star*'s expenses. Mr. Berdy also opined that the costs provided by Ms. Visconty should be altered based on what he termed inconsistencies in the record. He asserted that previous testimony by Mr. Love and Mrs. Torgersen conflict with Ms. Visconty's cost assumptions. Furthermore, Mr. Berdy testified that the crew compensation level proposed by Ms. Visconty was too low.

Without calling into question Mr. Berdy's general competence as an accountant, we have serious misgivings about his qualifications to testify in this case. Mr. Berdy had very limited experience in providing accounting services for fishing operations. Nor was he a disinterested witness. His limited experience was largely based on his work for Lund's Fisheries, which is owned by Mr. Reichle. Mr. Berdy traveled to the Netherlands with Mr. Reichle for meetings with Parlevliet and Van der Plas to discuss the purchase Lund's Fisheries. Mr. Berdy worked with an accountant from the Dutch partners and came up with a projected sales price for Lund's Fisheries. Mr. Berdy acknowledged that he did not directly rely on Generally Accepted Accounting Principles in his analysis. He exhibited a general lack of knowledge about the facts of this case.

Mr. Berdy testified that plaintiff should have included in its calculations an *ad valorem* customs duty which may have been assessed on the *Atlantic Star*, as well as the premiums for political risk insurance and additional drydocking costs. With respect to the *ad valorem* duty, Mr. Berdy relied on Mrs. Torgersen's deposition in which she referenced a $2 million estimate for this customs duty. When pressed by plaintiff's counsel Mr. Berdy conceded that he had made no further inquiries into the nature of the assessment, and "without doing proper research, [he] wouldn't know"

whether the *ad valorem* duty should be included as an operating cost.

Ms. Visconty explained that because the *ad valorem* tax is assessed on the vessel itself, as opposed to its operation, the tax is a capital cost. It is generally considered to be part of the cost of constructing a vessel. In addition, the nature of an *ad valorem* tax is that it is subject to negotiation between vessel owners and the government over a period of one to two years. She therefore concluded that the *ad valorem* tax should not be considered an operating cost.

Mr. Berdy also displayed a lack of understanding with respect to how the *Atlantic Star* had been financed. He was unaware of the reasons for obtaining political risk insurance and the terms of that insurance. Mr. Berdy stated that he would have to do further research before he could be sure that the cost of political risk insurance should be included within expenses. Because Mr. Berdy himself is not sure whether these costs should be included, the court will rely on Ms. Visconty's more authoritative analysis leaving them out.

Mr. Berdy's inclusion of drydocking costs was based on Mrs. Torgersen's offer to Congress to spend $1,000,000 on a repair facility in New England. There is no question that this was not a necessary cost. The offer was made in response to political pressure in an unsuccessful effort to preserve her fishing rights. For the same reasons, we decline to make any adjustments to Ms. Visconty's analysis as it relates to offloading costs. Mr. Berdy also based this adjustment on statements made by Mrs. Torgersen to members of Congress with respect to her willingness to build a cold storage facility and offload the majority of its catch on shore. We decline to make Mr. Berdy's proposed adjustments.

Finally, the court will not adopt Mr. Berdy's analysis of crew costs, which was based on Mr. Love's testimony. Without meeting Mr. Love, understanding his relationship to

plaintiff, or independently verifying his testimony, Mr. Berdy opined that the court should rely on Mr. Love's testimony regarding crew compensation. As explained earlier, the court did not find Mr. Love's testimony credible in its own right. It is no more credible when filtered through Mr. Berdy's report. Furthermore, Ms. Visconty provided the court with an extensive analysis of the *Atlantic Star*'s actual compensation of its crew, as well as salaries for similar vessels in Alaskan waters. The court finds this to be more reliable. We therefore make no adjustment to plaintiff's crew compensation costs.

d. Adjustment to Catch Volume

One adjustment to the basic assumptions of plaintiff's model must be made, however. In his calculations, Dr. Miller assumed that the *Atlantic Star* would produce 75,000 metric tons of fish (37,500 metric tons of herring, 37,500 metric tons of mackerel) each year. Plaintiff put forward testimony and exhibits showing the availability of fish well in excess of this 75,000 metric tons per year. Plaintiff met its burden to show that the *Atlantic Star* was physically capable of catching and processing this amount of fish each year. Defendant nevertheless urges the court to adjust plaintiff's model to reflect 50,000 metric tons per year, based on two theories.

First, defendant looks to plaintiff's comments made to Congress. Plaintiff had some notice that Congress, in response to pressure from owners of small local vessels, was considering voiding its permits. The government makes much of plaintiff's efforts to forestall congressional action. Mrs. Torgersen, along with Michael Love, met with members of Congress, including Senator Olympia Snow. At those meetings, plaintiff attempted to come to some agreement with those members whose constituents had expressed concern about the *Atlantic Star*. Mrs. Torgersen put together

several proposals. One of these proposals would place a self-imposed limit of 50,000 metric tons per year on the vessel. The efforts were to no avail. Nevertheless, defendant offers plaintiff's statements as proof that its original plans were actually smaller than 75,000 metric tons, on a scale with the reduced plans for harvesting offered under the duress of the negotiating process with Congress.

We are surprised and disappointed that the government would make use of statements, prompted under what amounts to political duress, to draw into question Mrs. Torgersen's credibility. The discussions between Mrs. Torgersen and members of Congress were about political compromise, not plaintiff's initial expectations. Plaintiff was at risk of losing its entire investment in the *Atlantic Star*, and, not surprisingly, was willing to make large concessions in order to preserve some value in that investment. We therefore assign no meaning to statements made during the negotiations about fishing capacity, on shore facilities or off-loading on shore.

The court is thus persuaded that the *Atlantic Star* was capable of producing in excess of 50,000 metric tons of fish. Indeed we are persuaded it was capable of producing in excess of 75,000 metric tons. The capacity and fish were there. In terms of the rental value of the boat, however, it is also relevant to know what would have been represented to prospective, albeit, tentative, renters. In this respect, plaintiff's business plan is important, and it is the evidence as to that plan which introduces uncertainty about the 75,000 metric ton figure, for an annual catch.

Uncertainty as to this figure was introduced by Mr. and Mrs. Torgersen themselves in their affidavits in support of plaintiff's motion for summary judgment. Mrs. Torgersen provided a declaration in support of Plaintiff's Response to Defendant's Motion for Summary Judgment in July of 1999.

In it, Mrs. Torgersen stated that APFC had planned to harvest Atlantic mackerel from December to May and Atlantic herring year round "for a total approximate amount of 50,000 [metric tons] per year." Mr. Torgersen agreed with those statements. Neither Mr. Torgersen nor Mrs. Torgersen were under compulsion to provide the court with that number. Plaintiff is bound by such statements. There is no reason the court should not rely upon them. We therefore find that plaintiff's original plans called for producing approximately 50,000 metric tons of herring and mackerel per year. This figure represents an unquestionable quantity that it both planned to produce and could in fact produce, and thus an appropriate figure for calculate what a willing renter would have paid.

DISCUSSION

A. Impact of *Tahoe* Regulatory Takings Analysis

After our decision in *American Pelagic I*, the Supreme Court decided *Tahoe-Sierra Pres. Council v. Tahoe Reg. Planning Agency*, 535 U.S. 302 (2002), addressing the elements of a temporary regulatory taking. The Court rejected a *per se* rule modeled solely on *Lucas*, because of its concern that the rule would make routine moratoria actionable. The routine delays inherent in a legitimate regulatory process should not prompt an automatic temporary taking. Instead, if regulatory action has the effect of denying all economically viable use of property, a *Penn Central* analysis is then conducted in order to determine whether, under "all the relevant circumstances" a taking is established. *Tahoe-Sierra*, 535 U.S. at 335 (referring to *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001)).

In the present case, the "relevant circumstances" include the fact that the character of the government action here strongly tends toward a taking. Congress retroactively revoked plaintiff's permits in a targeted fashion. The

Atlantic Star was the only vessel which fell within the ambit of the 1997, 1998, and 1999 Appropriation Acts. It is clear from the record that Congress' decision was not the result of a typical regulatory process. Instead, it was motivated by political considerations directly aimed at the *Atlantic Star*. Congress' action was far from being a routine delay in agency decision-making. There was no permit application pending. All permits had been granted. No decision was held in abeyance pending fact finding. Congress simply decided not to allow the *Atlantic Star* to fish using its previously issued permits. The character of the government action thus points to a taking. None of the Court's concerns in *Tahoe* about promoting deliberative regulatory consideration apply.

We thus confirm our previous holding that the three-part *Penn Central* test for a taking is met. The plaintiff had a reasonable investment backed expectation that it could profitably, legally, use its vessel. As further explained below, the economic impact was a 100 percent loss of economically viable use. And, finally, the character of the government's action points to a deliberate decision to take the use of the vessel for public purposes.

B. "All Economically Viable Use"

In *American Pelagic I*, we found that no other economically viable uses were available to the plaintiff. Nevertheless, because we left open the question of whether plaintiff had established any economic impact of the legislation, we allowed defendant at trial to offer evidence of alternative uses. As we found *supra*, however, there were indeed no other profitable uses available to the *Atlantic Star*. Defendant nevertheless offers three other arguments as to why plaintiff's evidence still does not satisfy its burden of proof.

Where a taking has occurred, compensation is required for a taking in "the extraordinary circumstance when no productive or economically beneficial use of [the property] is permitted." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992); *Tahoe-Sierra*, 535 U.S. 302 (distinguishing the normal regulatory action from the regulatory taking based on the removal of all economically viable use). The plaintiff bears the burden of showing that no economically viable use remains. *See Andrus v. Allard*, 444 U.S. 51, 60 (1979); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

Defendant contends first that, because plaintiff's books and records reflect a tax gain when the vessel was sold, plaintiff was not economically harmed by the taking. The fact that there may have been a paper tax gain does not mean the plaintiff did not suffer a temporary taking prior to the vessel's sale, however. In any event, as Ms. Visconty explained, any nominal tax gain was a result of removing the *Atlantic Star* from plaintiff's books. There was no real economic gain to plaintiff.

Defendant next contends that the proceeds from an insurance policy preclude recovery. The Lloyd's of London policy on which defendant relies provided insurance against loss of fishing permits. Defendant has argued throughout this case that plaintiff did not have a property interest in its permits. *American Pelagic I*, 49 Fed.Cl. at 46 (citing *Bradshaw v. United States*, 47 Fed.Cl. 549 (2000); *Hage v. United States*, 35 Fed.Cl. 147 (1996)). It is ironic that it now contends that insurance against loss of those permits prohibits plaintiff's recovery. In any event, the court held that the taking here was the use of plaintiff's boat. *American Pelagic I*, 49 Fed.Cl. at 51.

Defendant's argument misconstrues the purpose of the compensation aspect of the Takings Clause. The Fifth

Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 314 (1987). That condition is just compensation for that which is taken. The proceeds of an owner's insurance policy covering loss do not constitute just compensation from the government, nor does it mean that the government did not cause a complete diminution in value. The government cannot be the beneficiary of an insurance policy for which it did not pay.[29]

Defendant also argues that any loss suffered by plaintiff is a result of its own business decisions. Defendant would have the court find that because plaintiff did not sell its boat as soon as the 1997 Appropriations Act was passed, any subsequent loss was a result of plaintiff's choices. The facts are otherwise. This argument fails to take into account that the 1997 Appropriation Act and the 1998 Appropriations Act were potentially temporary. It was not until the passage of the 1999 Appropriations Act that the revocation of the plaintiff's permits was permanent. Plaintiff's decision to hold the vessel in the interim, while it attempted to avoid any extension of the permit cancellation, and while it sought to make some profitable use, was not unreasonable. Nor has defendant offered evidence that plaintiff turned down any

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[29] In *Shelden v. United States*, 34 Fed.Cl. 355 (1995), the court commented on the collateral source rule as it applied to the taking of plaintiff's mortgage. The court declined to diminish plaintiffs' recovery by the amount of the earthquake insurance which they had purchased on their home. The government could not benefit from the plaintiffs' foresight.

offers to purchase the *Atlantic Star* after passage of the 1997 Appropriations Act.

Finally, defendant argues that if plaintiff had built a different boat, or outfitted the *Atlantic Star* for a different fishery, plaintiff would not have had such a large loss. This is tantamount to criticizing plaintiff for owning something the government wanted to take. We assume defendant does not seriously advance this argument. In sum, the *Lucas* test is met: plaintiff has established the "extraordinary circumstance[] when *no* productive or economically beneficial use" remains. *Lucas*, 505 U.S. at 1017 (emphasis in original).

C. Fair Rental Value

Unlike a permanent taking, a temporary taking deprives the owner not of its property, but the use of its property for a fixed period of time. The owner is entitled to the "reasonable value of the property's use" during the temporary taking. *United States v. Pewee Coal Co.*, 341 U.S. 114, 117 (1951).

When a taking of property occurs, its owner must be compensated in the amount that was lost as a result of the taking. *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1581 (1990) (citing *First English*, 482 U.S. at 319). It is the duty of the court to determine compensation which places the owner of property "in as good a position pecuniarily as if his property had not been taken." *Yancey*, 915 F.2d at 1543 (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)). Compensation, however, is limited to what was actually taken by the government and excludes indirect or remote injuries. See *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945).

Unlike a permanent taking in which the court examines the market value of the fee interest prior to and subsequent to the takings period when determining damages, for a temporary taking it is well settled that the appropriate

measure of compensation is the fair rental value of property. *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949). *See also, First English*, 482 U.S. at 314. Were the difference between the market value of the fee before and after the taking the basis for compensation, "there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased during the period of the taker's occupancy." *Id.* The actual value of the property, the owner's initial investment in that property, and any other factors which go solely to the value of the fee interest are therefore irrelevant for purposes of determining fair rental value.

In general, the fair rental value of a property should be determined by market forces. *United States v. General Motors Corp.*, 323 U.S. 373 (1945). A hypothetical analysis is undertaken. The court attempts to determine what two parties making a voluntary exchange would have agreed upon, recognizing that the actual exchange was done under compulsion. *Kimball Laundry Co.*, 338 U.S. at 5-6. However, just compensation may not be reduced to a simple formula, tied solely to available market values. *See United States v. Cors*, 337 U.S. 325, 332 (1949). There may be instances in which the "market value furnishes an inappropriate measure of actual value." *General Motors Corp.*, 323 U.S. at 379. In fact, "when the property is of a kind seldom exchanged, [and] it has no 'market price,' * * * recourse must be had to other means of ascertaining value." *Kimball Laundry Co.*, 338 U.S. at 5-6. In that situation, the court attempts to determine the loss to plaintiff. See *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

Defendant proposes that, because in this case there is no readily ascertainable rental market, plaintiff is left without a remedy under the Takings Clause. Fortunately, the law is not

so unreasonable. As explained in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 256 (1946), "the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable." *See also Locke v. United States*, 151 Ct.Cl. 262, 267, 283 F.2d 521 (1960). "The ascertainment of value is not controlled by rigid rules or artificial formulae; what is required is a 'reasonable judgment having its basis in a proper consideration of all relevant facts.' " *American-Hawaiian Steamship v. United States*, 129 Ct.Cl. 365, 124 F.Supp. 378 (1954) (citing *The Minnesota Rate Cases*, 230 U.S. 352, 434 (1913)).

Plaintiff bears the burden of proving its loss to a reasonable certainty. *See Foster v. United States*, 2 Cl.Ct. 426, 445 (1983) (citing *United States v. 145.30 Acres of Land*, 385 F.Supp. 699, 702 (W. D. La.1974), aff'd, 524 F.2d 1231 (5th Cir. 1975)). It is entitled, however, to all reasonable inferences which may be drawn from the evidence. *See Locke*, 151 Ct.Cl. at 267-68, 283 F.2d 521 (1960). Moreover, that the inquiry is based on some conjecture is not fatal. *Yaist v. United States*, 17 Cl.Ct. 246, 257 (1989) (citing *United States v. Silver Queen Mining Co.*, 285 F.2d 506 (10th Cir. 1960)). Where there is no market for a piece of property, or one may not be readily discerned, it is the responsibility of the trial court to determine a fair rental value based on other data available. *United States v. Miller*, 317 U.S. 369, 374 (1943) ("Where, for any reason, property has no market, resort must be had to other data to ascertain its value.").

Plaintiff must show that there is a demand for the use which it proposes. *See Fordyce v. United States*, 7 Cl.Ct. 591, 600 (1985). The undeveloped nature of a market for large fishing vessels in the western Atlantic required the court to examine the market for similar vessels elsewhere in

the world. Plaintiff provided ample fact and expert testimony that permits a comparison of the *Atlantic Star* with production and sale by vessels operating in other areas.

Additionally, plaintiff must show that its use of the property was not a speculative or conjectured use. *See United States v. 320.0 Acres of Land*, 605 F.2d 762, 814 (5th Cir. 1979). Here, as discussed *supra*, it requires no speculation to conclude that plaintiff would have successfully used the *Atlantic Star* as a fishing vessel for Atlantic herring and mackerel off the East Coast of the United States.

As explained in *Kimball Laundry*, every takings case involves a counter-factual inquiry—what would willing parties have agreed upon if the government had not intruded, requiring an involuntary exchange. *Kimball Laundry*, 338 U.S. at 6. The absence of a competitive market, while important, does not destroy the court's ability to find damages in this case. Instead, it requires the court to examine additional evidence, provided in this case by Dr. Miller, about what would have transpired if a market had existed. As discussed above, Dr. Miller's model is based on extensive evidence and sound reasoning. The absence of a real-world market for the rental of the *Atlantic Star* does not render Dr. Miller's model speculative.

Because there was no actual rental market for fishing vessels like the *Atlantic Star*, a working model for a competitive market was necessary. This is what Dr. Miller attempted to construct. As explained above, his model provided the court with a probable revenue stream which would closely approximate the fair rental value of the *Atlantic Star* during the takings period. In a competitive market, the revenue stream that the *Atlantic Star* probably could have achieved is equivalent to the amount that a potential lessee would have been willing pay in order to rent the vessel. Basic economic principles dictate that potential

lessees would compete, bidding up to the revenue stream for the *Atlantic Star*. As lessor, then, plaintiff would have been able to realize this rental value but for the taking.

As discussed above, plaintiff put forward a number of highly qualified, competent and reliable witnesses. These witnesses demonstrated that plaintiff could have made a profit from the fishing and subsequent sales of herring and mackerel off the East Coast. The extensive and detailed report from Ms. Visconty more than satisfied plaintiff's burden to show offsetting costs which would have been incurred by the vessel when it was in operation.

Defendant would also have the court find that the component parts of plaintiff's damages model are too theoretical to provide the basis for damages. Specifically, defendant's witness, Mr. Reichle, opined that plaintiff's method of determining prices at which Atlantic herring and mackerel would have been sold during the damages period was speculative. For reasons set out above, however, we do not rely on Mr. Reichle's testimony. Furthermore, plaintiff's expert, Mr. Ellenton, gave a detailed explanation of his pricing method. Far from being speculative, it was based upon years of experience and information published by the Norwegian Seafood Export Council and the Netherlands Central Bureau of Statistics.

Defendant challenges the reasonableness of plaintiff's damages model. Based on Mr. Berdy's testimony, defendant argues that plaintiff's damage claim equates to a 368% return on equity when one begins with what plaintiff invested in the vessel. For the purposes of a temporary taking, however, we are not concerned with plaintiff's initial investment. Neither the purchase price nor the sale price of the *Atlantic Star* have any bearing on the amount to which plaintiff is entitled. This court does not look at the before and after values of a resource in a temporary takings analysis. *Yuba Natural*

Resources, 904 F.2d at 1577. Mr. Berdy's return on equity critique therefore fails as a matter of law. In any event the analysis suffers from another problem. Mr. Berdy based this return on equity only on the amount invested by Mrs. Torgersen. He did not include any equity added by Parlevliet and Van der Plas. Thus, his analysis is incomplete.

Defendant does not propose an alternative method of determining damages. In fact, when asked how he would calculate damages, Mr. Berdy outlined the very method which Dr. Miller used.

Finally, defendant contends that plaintiff has simply provided the court with a request for compensation for lost profits. We disagree. Unfortunately, there is no market from which to determine fair rental value. The net income which the *Atlantic Star* would have generated during the takings period simply provides the basis for calculating a fair market rent. See *Pettro v. United States*, 47 Fed.Cl. 136, 153 (2000) (damages for temporary taking of mineral rights based on probable rental value); *Bass Enterprises Production Co. v. United States*, 48 Fed.Cl. 621 (2001) (plaintiff entitled to interest it would have earned if its right to utilize an oil and gas lease had not been taken). Plaintiff's damage model is therefore permissible.

One adjustment is required, however. Plaintiff's damage model is based solely on an assumed production of 75,000 metric tons per year. We held, however, that plaintiff's damages should be limited to an assumed catch of 50,000 metric tons per year. Although we recognize that cost calculations are not uniformly proportionately driven by the amount of the catch, we find a fair approximation of damages would be two thirds of the amount claimed.

CONCLUSION

We conclude that plaintiff suffered a temporary regulatory taking of all value of its vessel for a twenty month

period. It has established a fair rental value of $37,275,952.67. The clerk is directed to enter judgment in that amount. Costs to plaintiff.

APPENDIX D

In the United States Court of Appeals for the Federal Circuit

AMERICAN PELAGIC FISHING COMPANY, L.P.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant

No. 03-5101

[December 9, 2004]

ORDER

A petition for rehearing en banc having been filed by the APPELLEE,* and a response thereto having been invited by the court and filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

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* Amicus curiae briefs were filed by the New England Legal Foundation, and the At-Sea Processors Association and Groundfish Forum.

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 16, 2004.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: December 9, 2004

APPENDIX E

Public Law 105-119, 111 Stat. 2440 (Nov. 26, 1997)

* * * * *

SEC. 616. (a) None of the funds made available in this Act may be used to issue or renew a fishing permit or authorization for any fishing vessel of the United States greater than 165 feet in registered length or of more than 750 gross registered tons, and that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower–

(1) as specified in the permit application required under part 648.4(a)(5) of title 50, Code of Federal Regulations, part 648.12 of title 50, Code of Federal Regulations, and the authorization required under part 648.80(d)(2) of title 50, Code of Federal Regulations, to engage in fishing for Atlantic mackerel or herring (or both) under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.); or

(2) that would allow such a vessel to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United States (except territories), unless a certificate of documentation had been issued for the vessel and endorsed with a fishery endorsement that was effective on September 25, 1997 and such fishery endorsement was not surrendered at any time thereafter.

(b) Any fishing permit or authorization issued or renewed prior to the date of the enactment of this Act for a fishing vessel to which the prohibition in subsection (a)(1) applies that would allow such vessel to engage in fishing for Atlantic mackerel or herring (or both) during fiscal year 1998 shall be null and void, and none of the funds made available in this Act may be used to issue a fishing permit or

authorization that would allow a vessel whose permit or authorization was made null and void pursuant to this subsection to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United States.

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Public Law 105-277, 112 Stat. 2681 (Oct. 21, 1998)

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SEC. 617. (a) None of the funds made available in this Act may be used to issue or renew a fishing permit or authorization for any fishing vessel of the United States greater than 165 feet in registered length or of more than 750 gross registered tons, and that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower–

(1) as specified in the permit application required under part 648.4(a)(5) of title 50, Code of Federal Regulations, part 648.12 of title 50, Code of Federal Regulations, and the authorized required under part 648.80(d)(2) of title 50, Code of Federal Regulations, to engage in fishing for Atlantic mackerel or herring (or both) under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.); or

(2) that would allow such a vessel to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United (except territories), unless a certificate of documentation had been issued for the vessel and endorsed with a fishery endorsement that was effective on September 25, 1997, and such fishery endorsement was not surrendered at any time thereafter.

(b) Any fishing permit or authorization issued or renewed prior to the date of the enactment of this Act for a fishing vessel to which the prohibition in subsection (a)(1) applies that would allow such vessel to engage in fishing for Atlantic mackerel or herring (or both) during fiscal year 1999 shall be null and void, and none of the funds made available in this Act may be used to issue a fishing permit or authorization that would allow a vessel whose permit or authorization was made null and void pursuant to this subsection to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United States.

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SEC. 202. STANDARD FOR FISHERY ENDORSEMENTS.

(a) STANDARD.–Section 12102(c) of title 46, United States Code, is amended to read as follows—

* * * * *

"(6) A vessel greater than 165 feet in registered length, of more than 750 gross registered tons, or that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower is not eligible for a fishery endorsement under section 12108 of this title unless

"(A)(i) a certificate of documentation was issued for the vessel and endorsed with a fishery endorsement that was effective on September 25, 1997;

"(ii) the vessel is not placed under foreign registry after the date of the enactment of the American Fisheries Act; and

"(iii) in the event of the invalidation of the fishery endorsement after the date of the enactment of the American Fisheries Act, application is made for a new fishery

endorsement within fifteen (15) business days of such invalidation; or

"(B) the owner of such vessel demonstrates to the Secretary that the regional fishery management council of jurisdiction established under section 302(a)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)) has recommended after the date of the enactment of the American Fisheries Act, and the Secretary of Commerce has approved, conservation and management measures in accordance with such Act to allow such vessel to be used in fisheries under such council's authority.".

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Public Law 106-31, 113 Stat. 57 (May 21, 1999)

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SEC. 3025. Section 617 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999 (as added by section 101(b) of division A of the Omnibus Consolidated and Emergency Supplemental Appropriations Act 1999 (Public Law 105-277)) is amended–

(1) by striking subsection (a) and inserting the following:

"(a) None of the funds made available in this Act or any other Act hereafter enacted may be used to issue or renew a fishing permit or authorization for any fishing vessel of the United States greater than 165 feet in registered length, of more than 750 gross registered tons, or that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower as specified in the permit application required under part 648.4(a)(5) of title 50, Code of Federal Regulations, part 648.12 of title 50, Code of Federal

Regulations, and the authorization required under part 648.80(d)(2) of title 50, Code of Federal Regulations, to engage in fishing for Atlantic mackerel or herring (or both) under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), unless the regional fishery management council of jurisdiction recommends after October 21, 1998, and the Secretary of Commerce approves, conservation and management measures in accordance with such act to allow such vessel to engage in fishing for Atlantic mackerel or herring (or both)"; and

(2) in subsection (b), by striking "subsection (a)(1)" and inserting "subsection (a)".

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